Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The
Supreme Court of the United States

MARK D. DAVIS,

Petitioner,

v.

TONYA S. BLACKSTOCK,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR WRIT OF CERTIORARI

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May 19, 2010

QUESTIONS PRESENTED FOR REVIEW

(1) Does the Supreme Court of Alabama's application of the ore tenus rule in a fundamental liberty interests case violate the Due Process Clause of the 14th Amendment of the United States Constitution?

The "ore tenus rule" is an appellate rule of procedure which has been applied since the 1800's in the context of various kinds of Alabama property cases. According to the Supreme Court of Alabama, in an appeal of a trial court judgment based upon evidence presented "ore tenus", i.e. orally, the appellate court must accord the trial court judgment a presumption of correctness.

In the case at bar, each parent of the minor child, Katie, is a fit, loving parent. After a Tennessee trial court entered a final child custody order for Katie to have equal time with each of her fit parents, an Alabama trial court changed that and used a "standard visitation" order to achieve a lopsided split of Katie's time between her two fit parents.

On appeal Alabama Court of Civil Appeals reversed the Alabama trial court, holding there was not a material change of circumstances which justified a change in the Tennessee child custody order, and restoring the operation of the Tennessee equal time court order.

The Supreme Court of Alabama then invoked the ore tenus rule, preventing the Alabama Court of Civil Appeals reversal of the Alabama trial court, and sustaining the Alabama trial court's lopsided visitation order. So in this case the Supreme Court of Alabama applied the ore tenus rule not in a property rights case, but in a case adjudicating fundamental liberty interests of three different persons, Katie and her two fit, loving parents.

(2) Is the Alabama "best interest of the child" statute, Alabama Code § 30-3-150 et seq., overbroad and unconstitutional as applied in the case at bar because Katie's fit, loving parents are treated as if they are unfit? (App. K, p. 147a); also *See Ex parte Byars*, 794 So. 2d 34 (Ala. 2001).

Since 1940 the Supreme Court of Alabama has used the doctrine of parens patriae as authority for an Alabama trial court in a divorce case involving a minor child to deem the minor child a ward of the state, and then intrude into parent and child relationships, even when each parent is fit and there is no evidence either parent has done substantial harm to the child.

Under these circumstances, when the Alabama trial court's "standard visitation" order discriminated between two similarly situated fit parents (lopsided time split in favor of one fit parent and against the other fit parent), did the court's standard visitation order violate:

Katie's constitutional right to freedom of association with each parent;

Katie's Dad's constitutional right to freedom of association with Katie; and

Katie's Mom's constitutional right to freedom of association with Katie?

Katie has a human right to, and a vested liberty interest in, freedom of association with each of her parents. Katie's liberty interest in freedom of association with each of her parents is protected by the 1st Amendment of the United States Constitution.

Katie's Dad has a human right to, and a vested liberty interest in, freedom of association with Katie. Katie's Dad's liberty interest in freedom of association with Katie is protected by the 1st Amendment of the United States Constitution.

Katie's Mom has a human right to, and a vested liberty interest in, freedom of association with Katie. Katie's Mom's liberty interest in freedom of association with Katie is protected by the 1st Amendment of the United States Constitution.

So when the Alabama court terminated the Tennessee custody order and Katie's equal time when each parent, did the Alabama court's lopsided time "standard visitation" order violate:

Katie's constitutional right to freedom of association with each parent;

Katie's Dad's constitutional right to freedom of association with Katie; and

Katie's Mom's constitutional right to freedom of association with Katie?

(3) As between Katie's fit Dad and Katie's fit Mom, did the Alabama trial court's "standard visitation" order for a lopsided split of Katie's time between the two parents discriminate between two similarly situated persons in violation of the Equal Protection Clause of the 14th Amendment of the U.S. Constitution?

(4) When the Alabama trial court acted *in loco parentis* and decided the "best interest of the child", did the court violate the right of each fit parent to substantive due process, procedural due process, and equal protection of the laws guaranteed by the 14th Amendment of the United States Constitution?

In the case at bar, the Tennessee court final judgment adjudicated custody of Katie on an equal time basis (alternating periods of four consecutive days for each parent) in accordance with the constitutional imperative for parental equality in the Equal Protection Clause of the 14th Amendment of the U.S. Constitution.

After each parent and Katie moved from Tennessee to Alabama, but without any material change in their circumstances, an Alabama court changed the Tennessee equal time child custody order to a lopsided time split which does not comply with the constitutional imperative for parental equality in the Equal Protection Clause.

The Alabama Court of Civil Appeals held there was no material change in circumstances (App. F, p. 90a) as required for the Alabama trial court to terminate the Tennessee court equal time custody order. But the Alabama Supreme Court reversed (App. G, p. 102a) on the basis of the "ore tenus" rule.

In the absence of a material change in circumstances, did the Full Faith and Credit Clause of the U.S. Constitution, Article IV, clause 1, require the Alabama trial court to give full faith and credit to the Tennessee equal time child custody order?

The Alabama court clearly obtained *in personem* jurisdiction over Katie's Dad, Katie's Mom common and Katie, but in the absence of a material change in circumstances, did the Alabama trial court ever acquire jurisdiction over the subject matter of Katie's custody?

When the Alabama trial court used parens patriae to deem Katie a ward of the state, in the absence of clear and convincing evidence of parental unfitness, did the Alabama court violate the right of each fit parent to substantive and procedural due process?

Did the failure of the Alabama trial court to enter findings of fact and conclusions of law violate the right of each fit parent to procedural due process?

PARTIES TO THE PROCEEDINGS

The Sole Petitioner is Mark D. Davis, natural father of one minor child; and

The Sole Respondent is Tonya S. Blackstock, natural mother of the same minor child.

The real party in interest is the minor child of the named parties, Katie Nichole Davis, known as "Katie" (date of birth, 12/27/2001, age 8, as of the filing of this Petition).

RULE 29.6 STATEMENT

Mark D. Davis is an adult, natural person.

Tonya S. Blackstock is an adult, natural person.

Katie Nichole Davis is a natural person under the disability of minority.

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INTRODUCTORY PRAYER

Petitioner, Mark Davis (Mark), respectfully requests that a writ of *certiorari* be granted to review the February 19, 2010, order denying rehearing of the judgment and opinion of the Supreme Court of Alabama entered on September 11, 2009, which reversed the Alabama Court of Civil Appeals judgment and opinion entered on June 29, 2007, which reversed the Alabama trial court child custody order dated September 1, 2006.

The Alabama trial court modified a Tennessee constitutionally compliant equal- child custody order based on identical facts as previously addressed in Tennessee.

OPINIONS BELOW

This Petition stems from Petitioner's case in the Alabama state courts after a final appellate order from the state court of last resort, the Supreme Court of Alabama.

On February 19, 2010 the Supreme Court of Alabama entered an order denying Petitioner's application for rehearing of the judgment and opinion of the Supreme Court of Alabama entered on September 11, 2009, which reversed the Alabama Court of Civil Appeals judgment and opinion entered on June 29, 2007, which reversed the Alabama trial court child custody order dated August 31, 2006.

The per curiam Order of Supreme Court of Alabama entered February 19, 2010, denying Petitioner's Request for Rehearing is not reported. (App. H).

Petitioner's September 25, 2009 Application for Rehearing is not reported. (App. M).

The per curiam judgment and opinion of the Supreme Court of Alabama entered on September 11, 2009, which reversed the Alabama Court of Civil Appeals, is reported as [Ms. 1061445] ____So. 3d ___, __ (Ala. 2009). (App. G).

The judgment and opinion of the Alabama Court of Civil Appeals entered on June 29, 2007, which reversed the Alabama trial court child custody order, is reported as [Ms. 2060017] ___ So. 3d __ , ___ (Ala. Civ. App. 2007)). (App. F).

The Alabama trial court unequal time child custody order entered on September 1, 2006, which reversed the Tennessee trial court equal time child custody order, is not reported. (App. E).

The judgment and opinion of the Tennessee Court of Civil Appeals entered on October 12, 2004, which sustained the Tennessee trial court equal time child custody order, but reversed and remanded for a determination of primary parent and additional consideration of child support, is reported as (No. M2003-02312-COA-R3-CV) (Lexis 664,) (Tenn. Ct. App. 2004) (not reported in S.W.3.d). (App. D).

The first judgment and opinion of the Tennessee Court of Civil Appeals entered on September 27, 2004, which sustained the Tennessee trial court equal time child custody order, was reported but replaced with the October 12, 2004 opinion. (App. C).

The Tennessee trial court child custody order entered on September 3, 2003, which decided custody of the minor child should be divided equally between the parents, is not reported. (App. B).

The Tennessee trial court child custody order entered on February 15, 2002, which divorced the father and the mother and initially decided custody of the minor child, is not reported. (App. A).

JURISDICTION

The judgment and opinion of the Alabama Supreme Court was entered on September 11, 2009. A timely Request for Rehearing was denied on February 19, 2010. This Petition is timely filed according to Supreme Court Rules 13.1 and 13.3. The Court derives jurisdiction from 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The below-referenced Constitutional and Statutory Provisions are set forth in Appendix.

United States Constitution

The 1st Amendment of the United States Constitution;

The Due Process Clause of the 14th Amendment of the United States Constitution;

The Equal Protection Clause of the 14th Amendment of the United States Constitution;

The Full Faith and Credit Clause of the United States Constitution, Article IV, clause 1;

Alabama Statutes

The Uniform Child Custody Jurisdiction and Enforcement Act, Ala. Code 1975, § 30-3B-101 et seq.;

Code of Alabma 26-17-2.

Alabama Code 30-3b-101 *et. seq.*

Alabama Code 30-3-160 *et.seq.*

Alabama Code 30-3-150 *et.seq.*

STATEMENT OF THE CASE

In *Parham v. J.R. et al* 442 U.S. 584 (1979), the Supreme Court of the United States declared:

> "[T]he best interest of the child' resides in the fit parent - not in the state: "Our constitutional system long ago rejected any notion that a child is a "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations."

In *Troxel v. Granville*, 530 U.S. 57 (2000) Supreme Court of the United States said the following:

> "[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a judge believes a `better' decision could be made."

Alabama Supreme Court Justice Parker in his dissent in *Ex parte GC*, 924 So. 2d 651 (Ala. 2005), Id 674 to 681, said the following:

> "...each time a court considers a child-custody dispute it should begin by taking judicial notice of the fact that parents possess the right and responsibility to govern and raise their children; that God, not the state, has

> given parents these rights and responsibilities, and, consequently, that courts should interfere as little as possible with parental decision-making, instead deferring to parental authority whenever it has not been fundamentally compromised by substantial neglect, wrongdoing, or criminal act."
>
> "I believe the best interests of a child are served by strengthening the state's acknowledgment of, and deference to, parental rights, because God has specially and uniquely equipped parents to raise their children so that any parent who possesses at least some love can care for his or her child better than the state, which by its nature cannot love. Consequently, the best interests of children are served by the state's declining to interfere with family government merely because its agents can, in individual cases, conceive of ways to improve the lot of a particular child."

Interestingly, in the case at bar, just as in *Troxel* there was not one scintilla of evidence that Mark, an equal custodial and de facto primary parent to the minor child (Katie), is unfit. There is nothing in the evidential record to justify the Alabama Supreme Court to consider opinions of total strangers making best interest decisions for Katie over those of Mark.

This case involves the denial of full faith and credit, procedural and substantive due process, equal

protection, associational rights and parental rights where the state of Alabama has denied constitutionally guaranteed fundamental liberty interests to the parent-child relationship.

The Alabama trial court modified a previous and final child custody determination for equal-custody custody between Mark and the Respondent (Tonya). Equal custody was ordered against the desire of Tonya – as well as the maternal grandmother - to protect Katie's best interest to a relationship[1] with both her parents.

The Supreme Court of Alabama in relying upon a judicially created ore tenus rule instead of applying Alabama statutory law that the state legislature said children need both parents; joint custody is the official policy of the state of Alabama; and joint custody should be considered in every case. Alabama Code § 30-3-150 *et seq* and § 30-3-160 *et seq*.

With no checks and balances a sole trial court judge with the blanket approval of the Alabama Supreme Court has violated Mark's and Katie's due process and equal protection rights when clear

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[1] Code of Alabama 26 17 2. Parent and child relationship defined. The term `parent and child relationship' shall mean the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties and obligations. It shall include the mother and child relationship and the father and child relationship.

evidence showed (1) there were no material changes since the previous ordered custody determination; (2) Katie is well-adjusted and thriving in equal custody; and (3) Tonya was obviously forum shopping for a different determination.

This case illuminates an approach to the law of family relationships by the Supreme Court of Alabama which is opposed to well-established principles of constitutional law articulated by the Supreme Court of the United States. Addressing this conflict between the Alabama approach and U.S. Supreme Court case law is the primary reason the writ requested in this petition should be granted.

Federal case law on family and related relational rights

When the sanctity of the family is invaded by unwarranted state actions, constitutional protection of family relationships is appropriate. "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

In various contexts, the Supreme Court of the United States has recognized and protected parental rights under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments of the United States Constitution. Throughout the modern era, the Supreme Court of the United States has consistently

emphasized the importance of the family and repeatedly described the rights of citizens in marriage, parenting, and family rights as "fundamental" or "basic civil rights."

In a variety of cases involving parental rights, the United States Supreme Court has articulated a long, but not exhaustive, list of parental rights.

> "The liberty interest at issue... **care**, **custody**, and **control of their children... establish a home** and **bring up children... control the education... direct the upbringing and education... nurture** him and **direct his destiny... prepare him for additional obligations... custody, care, and nurture... companionship, care, custody, and management...** [I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 65-66, (2000).

Without exception, each and every one of the above-stated "parental rights" of not only Mark, but also Tonya, is implicated[2] by the lopsided "visitation order" entered by the Alabama trial court in this case.

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[2] "Implicated" is intended to broadly encompass all aspects of diminished liberty, and is synonymous with such words as "infringed", "impinged upon", "restricted", "terminated", etc.

Parental rights are recognized by the Supreme Court of the United States as "fundamental"

It is axiomatic that parenting is a fundamental right. More so than any other category of fundamental rights recognized in American law, the fundamental parental rights of *each* parent are protected from state action by the United States Constitution. U.S. Constitutional rights protect not just the relationship of one parent or the other parent with Katie - *each* fit parent's autonomous set of fundamental parental rights with Katie are protected. These Constitutional rights are grounded in:

(1) **Liberty** (14th Amendment);

(2) **Privacy** (as a constitutional penumbra protecting the family, and as a penumbra of the specific guarantees of the Bill of Rights, and as an element of the 9th Amendment, and under the autonomy branch of privacy found in the guarantee of substantive due process in the 14th Amendment);

(3) **Association** (1st Amendment);

(4) **Procedural Due Process** (14th Amendment);

(5) **Substantive Due Process** (14th Amendment);

(6) **Equal Protection** (14th Amendment);

(7) **Supremacy Clause** (Art. VI); and

(8) **Other Rights retained by the People** (9th Amendment).

Under the U.S. Constitution, fundamental rights of the individual fit parent are entitled to the utmost protection from unwarranted intrusion by the state. In the context of parental rights, *each* parent is invested with a set of rights in their parent-child relationship, rights which are "essential", "fundamental", and "basic", *and* the liberty interest to freely exercise all of those rights without interference from the state. Not so in Alabama, where the Supreme Court of Alabama deems every child in a divorce case a ward of the state. *Esco v. Davidson*, 308 So. 193 (Ala. 1940) Where else is anyone deemed a ward of the state without any due process protections?

The set of fundamental parental rights of *each* parent is co-existent and co-equal with the set of fundamental parental rights of the other parent. The autonomous parental rights of *each* parent are rooted in the relational nexus between *each* parent and the child.

Mark and Tonya each are entitled as a matter of law to equal treatment in the Alabama courts. "A citizen of the United States has a perfect constitutional right to... equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right...." *Saenz v. Roe*, 526 U.S. 489, ___ (1999). In other words, this Court should require the Supreme Court of Alabama

to treat each fit parent as an equal before the bar of justice; to do otherwise is to deny one of them the equal protection of the laws to which each parent is entitled as a matter of constitutional law.

As between two fit parents, the only way to afford them the constitutional protection to which each is entitled is to apply to each the (rebuttable) presumption of equality before the bar of justice, coupled with the requisite due process if and when their parental rights are implicated by state action. The Supreme Court of Alabama does no such thing.

The Supreme Court of Alabama is parens patriae for all children in Alabama child custody cases, even when the parents are fit, loving parents who have done no substantial harm to their child. So what, then, is the basis in fact for the Supreme Court of Alabama to exercise parens patriae authority and act *in loco parentis* to take control of the lives of fit parents like Mark and Tonya and children like Katie?

U.S. Supreme Court jurisprudence requires that the Supreme Court of Alabama change their exercise of parens patriae authority - between a parent and the state, the parent has primacy in the child's life

"The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the

upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

"It is cardinal with us that the custody, care, and nurture of the child reside first in the parents. ... The integrity of the family unit has found protection in the Due Process clause of the Fourteenth Amendment, ... the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment ..." (citations omitted). *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

Assessment of parental fitness begins with a rebuttable legal presumption that each parent is fit

Under all relevant U. S. Supreme Court cases, the assessment of parental fitness begins with a legal presumption that each parent is fit[3], unless and until otherwise pleaded and proved to a sufficient evidentiary standard, because of the legal presumption that the "natural bonds of affection lead parents to act in the best interests of their children." *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *Troxel v. Granville*, 530 U.S. 57, 68 (2000).

See, for example, *Stanley v. Illinois*, 405 U.S. 645 (1972) where the State of Illinois was not allowed to simply presume that an unwed father was unfit to

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[3] The term "fit parent" used in this motion is a descriptive term, not a term of art.

have custody of his children, because his interest in his children warrants deference and protection. See also *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977); *Little v. Streater*, 452 U.S. 1 (1981); *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981); *Santosky v. Kramer*, 455 U.S. 745 (1982). This line of cases is unified by a powerful legal principle: in the absence of proof, to a sufficient evidentiary standard, that either parent is unfit, a court is without lawful authority to implicate the rights of either fit parent in the free exercise of their liberty, rights, and responsibilities as a parent.

The law does not require a parent to be perfect in order to be fit

The record in this case reflects concerns by both Mark and Tonya about the flaws of the other parent, but the law does not require a parent to be perfect in order to be fit. It is clear from the record in this case that neither Mark nor Tonya have been found culpable of substantial harm to Katie. Consequently, this is a case involving two "fit parents" as parties.

In cases involving fit parents, parental rights cannot be implicated by state action even if the parent has not been "perfect" in their child rearing responsibilities. The [f]undamental liberty interest of natural parents in the care, custody and management of their child does not evaporate... because they have not been model parents. *Santosky v. Kramer*, 455 U.S. 745, 748 (1982).

"[S]o long as a parent adequately cares for his or her children [*i.e.*, is fit], there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Reno v. Flores*, 507 U.S. 292, 304 (1992); *Troxel*, 530 U.S. 57, 87 (2000).

Social studies data consistently support the fact that a child has powerful needs for care and nurture from both parents. There is no doubt that Katie needs both Mark and Tonya to be fully engaged as her parents. Moreover, "[m]aternal and paternal roles are not invariably different in importance." *Caban v. Mohammed*, 441 U.S. 380, 381 (1979).

Katie's many needs for each of her parents strongly militate for equal treatment in law of each parent without unwarranted interference by the Alabama Court. Court intervention into fit parent-child relationships is proscribed because the U.S. Constitution requires the state to keep the parental rights of each fit parent inviolate. The Supreme Court of Alabama apparently thinks otherwise.

In state action against a fit father, the state's interest in the child is *de minimis*, and parental unfitness may not be presumed by the state - the state must prove unfitness

> "The State's interest in caring for Stanley's children is de minimis if Stanley is shown to

> be a fit father. It insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family. The State of Illinois assumes custody of the children of married parents, divorced parents, and unmarried mothers only after a hearing and proof of neglect. *Stanley v. Illinois*, 405 U.S. 645, 657-58 (1972)."

The Supreme Court of Alabama not only deems a child of divorce is a ward of the state without any basis in fact, the fit parents of the child are treated as unfit even though they are in fact fit, loving parents who have no need or desire for the Alabama courts to micro-manage their lives with detailed child custody orders.

REASONS FOR GRANTING THE PETITION

The Court could take the *Troxel v. Granville* case and change the names to the case at bar, and the facts are identical. Other than this is a parent v. parent case where the Mark and Tonya have equal custody ordered in Tennessee against the desires of Tonya. The equal time order is due to Tonya's repeated attempts to erode the father-child relationship. This is exactly what the Tennessee

Court of Appeals said about Respondent when they issued their opinion in this case. (App. D)

The Court in *Bowen v. Gilliard*, 483 US 587 (1987) said the following:

> "The family is an institution "deeply rooted in this Nation's history and tradition." *Moore v. East Cleveland*, 431 U. S. 494, 503 (1977). Our society's special solicitude for the family reflects awareness that "[i]t is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." Id., at 503-504 (footnote omitted).[2] As a result, we have long recognized that "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." *Santosky v. Kramer*, 455 U. S. 745, 753 (1982). See also *Cleveland Board of Education v. LaFleur*, 414 U. S. 632, 639 (1974). Therefore, "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." *Moore, supra*, at 499.[3]"

> "A fundamental element of family life is the relationship between parent and child. As we said in *Lehr v. Robertson*, 463 U. S. 248, 256 (1983): "The intangible fibers that connect

> parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases." We have thus been vigilant in ensuring that government does not burden the ability of parent and child to sustain their vital connection. See, e. g., *Santosky*, *supra*, at 753; *Stanley v. Illinois*, 405 U. S. 645 (1972); *Meyer v. Nebraska*, 262 U. S. 390 (1923).[4]"

The Court ruled in *Troxel v. Granville* 530 U.S. (2000):

> "[S]o long as a parent adequately cares for his or her children (i.e. is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."

The level of scrutiny required for a family court to infringe upon fundamental rights of either parent is "*strict scrutiny*", which requires the court to show that the infringement serves a "*compelling state interest*" and that there is no constitutionally less offensive way for the state to satisfy this compelling interest.

The case at bar is absolutely different than a typical divorce custody situation because while the parties are divorced they both were proven legally fit in prior judicial proceedings in the state of Tennessee. Since both parents have equally exercised parenting Katie since the prior custody determination, both parents are entitled by equal protection and associational rights with Katie. We are Katie's family. Katie has that same right to both parents and the Alabama trial court order purposely infringes upon vital fundamental liberty interests guaranteed by the Constitution, when said learned judges are to guard and protect citizens constitutional rights, it is high tide for the Court to advice Alabama judges such denial of due process, denial of equal protection and gender discrimination has no place in law of the land.

CONSTITUTIONAL RIGHTS NOT WAIVED

Mark is aware the Supreme Court of the United States may refuse to address constitutional issues raised for the first time in an Application for Rehearing unless he can convince the Court those rights were not waived and/or the state court did not consistently follow state procedural requirements.

Mark asserts the Alabama Supreme Court routinely grants Applications for Rehearing.

Mark will prove to the Court that Alabama inconsistently applies standards of review, does not

honor currently statutory law, and does not consistently follows state procedural requirements.

Courts are to protect constitutional rights

Mark, as any Alabamian would, expected the Alabama trial court to give full, faith and credit to the Tennessee Court order and the Tennessee Appeals Court opinion. Unfitness of Mark has never been raised in either Tennessee or Alabama.

Mark is able to adjust his work schedule so to be a stay at home nurturing father during times Katie is in his personal care. He, nurtured, fed, bathed, read, taught and cared for Katie. His determination of Katie's best interests – according to the Court - must be given deference over that of strangers and a state court judge, which the Alabama Supreme Court has not done.

Mark and Katie received a constitutionally protected judicial custody determination in Tennessee against the desires of Tonya – but he expected the Tennessee order upheld when nothing materially changed. It is clear by convincing evidence from this pleading the Alabama trial court nor the Alabama Supreme Court acted based on those protections although it is a duty of all judges to guard and protect constitutional rights of citizens.

Alabama Appellant Courts have a duty to correct erroneous applications of law. Petitioner expected

the judge to know law, and expected the court to protect his constitutional rights.[4]

It is clear 5 judges of the Alabama Civil Court of Appeals held Respondent didn't prove a material change in circumstances since the previous determination consistent with standing Alabama law. The material change of circumstances has been the standard of review since the 1950's.

Mark's and Katie's constitutional rights were not violated until the Alabama Supreme Court issued their opinion. Mark pointed out that in the Application for Rehearing which was denied.

Equal Protection to State Procedural Requirements

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[4] *Ex parte CV*, 810 So. 2d 700 (Ala 2001), at fn3, quoting Justice See:

> "Upon entering the office of Associate Justice of this Court, I took the following oath, as required by the Alabama Constitution of 1901:
>
> > "I solemnly swear that I will support the Constitution of the United States, and the Constitution of the State of Alabama, so long as I continue a citizen thereof; and that I will faithfully and honestly discharge the duties of the office upon which I am about to enter, to the best of my ability. So help me God."

Addressing the failure to comply with state procedural requirements, the Court in *Hathorn v. Lovorn*, 457 U.S. 255 (1982) at 263 said,

> "We have recognized that the failure to comply with a state procedural rule may constitute an independent and adequate state ground barring our review of a federal question. Our decisions, however, stress that a state procedural ground is not "adequate" unless the procedural rule is "strictly or regularly followed." *Barr v. City of Columbia*, 378 U. S. 146, 149 (1964). State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims. Even if we construe the Mississippi Supreme Court's denial of petitioners' petition for rehearing as the silent application of a procedural bar, we cannot conclude that the state court consistently relies upon this rule."

The Supreme Court of the United States in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) said,

> "...our jurisdiction is not defeated if the nonfederal ground relied on by the state court is "without any fair or substantial support," [Citation omitted]. It thus becomes our duty to ascertain, ". . . in order that constitutional guaranties may appropriately be enforced, whether the asserted non-federal ground

> independently and adequately supports the judgment." [Citation omitted]

Also, Supreme Court of the United States in *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288 (1964) at 301 said,

> "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights."

The Alabama Supreme Court routinely grants Applications of Rehearings. See *Cline v. Ashland, Inc.*, 970 So. 2d 755 (Ala. 2007); *Ex parte Medical Licensure Com'n of Alabama*, 13 So. 3d 397 (Ala. Civ. App. 2008); *Boles v. Parris*, 952 So. 2d 364 (Ala. 2006); In *GP v. AAK*, So. 2d 1252 (Ala. Civ. App. 2002); *Ex parte State*, 660 So. 2d 1026 (Ala. 2004); *Ex parte CV*, 810 So. 2d 700 (Ala. 2001); Nunn v. Baker, 518 So. 2d 711 (Ala. 1987); *Ex parte Grayson*, 479 So. 2d 76 (Ala. 1985).

In *Ex parte CV*, an ore tenus case reversed the trial court. Here is what they said,

> "Although under the ore tenus rule this Court defers to a trial court's judgment when the court's findings of fact are based on evidence presented ore tenus, this Court must nevertheless reverse the trial court's judgment when, as here, it is "clearly erroneous, without

> supporting evidence, manifestly unjust, or against the great weight of the evidence."

In *Ex parte Grayson*, Petitioner brought to the Alabama Supreme Court attention a recent U.S. Supreme Court case, the Alabama Supreme Court granted the application.

In *Baker*, an Application for Rehearing was granted by the Alabama Supreme Court even though defendants brought issues before the court for the first time on appeal.

The "clear and convincing evidence" evidentiary standard

Before the state may interfere in a parent-child relationship to protect the child, the harm must be proven to a legally sufficient evidentiary standard. The Supreme Court of the United States has held that the requisite standard is "clear and convincing evidence". *Santosky, id.*

If harm to the child by a parent is proven by clear and convincing evidence, then the parent has been proven to be unfit to parent the child, and state action is warranted. Consequently, to the degree necessary to protect the child from further harm by the unfit parent, and the state may restrict or terminate that parent's liberty to parent the child without state interference.

In other words, it is the parent's harmful misconduct toward the child which warrants state action that restricts or even ends that parent's liberty to parent the child.

This state action as "protector of innocents" stems from the concept of the state as "*parens patriae*". When the state proves a parent's harmful misconduct toward the child, the state may intercede in the parent-child relationship and, acting in place of the unfit parent, decide what is in the best interest of the minor child.

As *Santosky* makes clear, it is not the burden of the parent to prove they are fit; it is the burden of the state to prove the parent is unfit. In the absence of proof to the requisite evidentiary standard that a parent has harmed their child, the parent is presumed to be fit, and state action is unwarranted. *Parham v JR, id.*

Unless and until a parent has been proven to be unfit by clear and convincing evidence, no factual condition precedent triggers the exercise of the state's *parens patriae* authority to act in place of the fit parent and decide what is in the best interest of the minor child

Unfitness of a Parent Explained

In *Stocks v. Stocks* [Ms. 2080941] ___ So. 3d__,__(Ala. Civ. App. April, 30, 2009), Judge Moore concurring in part; dissenting in part, said the

following about Alabama's application of parental unfitness:

> "The concept of "unfitness" has been rooted in our child-custody jurisprudence since at least 1860 when our supreme court stated:
>
> > "So strong is the presumption, that 'the care which is prompted by the parental instinct, and responded to by filial affection, is most valuable of all'; and so great is the reluctance of the court to separate a child of tender years from those who according to the ordinary laws of human nature, must feel the greatest affection for it, and take the deepest interest in its welfare, -- that the parental authority will not be interfered with, except in case of gross misconduct, or where, from some other cause, the parent wants either the capacity or the means for the proper nurture and training of the child. Where a contest for the custody of a child arises between its father or mother and a third person, the superior claim of the parent ought not, in our opinion, to be disturbed, unless it plainly appears that the interests of the child require it to be set aside. Whenever it is shown that the parent is guilty of gross ill-treatment or cruelty towards his infant children, or that his conduct or domestic associations are

> such that the children cannot associate with him without moral contamination, it is the duty of the court to interfere for their protection, and to appoint a suitable person to take care of them and superintend their education. *Striplin v. Ware*, 36 Ala. 87, 89-90 (1860) (citations omitted)."

> "In *Striplin*, the court affirmed a judgment that refused to remove children from the custody of their natural mother and their stepfather because, the court held: "The evidence in this case is wholly insufficient to show that the mother is, either physically or mentally, incapable of taking proper care of these children." 36 Ala. at 90."

Additionally Judge Moore in *Stocks* said,

> "Over the years, our supreme court has only strengthened the principles set out in *Striplin* by requiring an express finding of unfitness, with such a finding to be premised on clear and convincing evidence. (Citations omitted)

> ".... However, the substantive meaning of the term "unfitness" carries with it the same connotation that it did at the time the opinion in *Striplin* was released -- an inability or unwillingness on the part of a parent to provide properly for the needs of his or her

> children for food, clothing, shelter, medical care, education, nurturing, and protection."

There is nothing in the Alabama record Mark is unfit.

The Alabama "Orc Tenus" Rule

The "orc tenus" rule is so well known in Alabama that the state judicial system does not cite it by its official name, Rule 52 of the Alabama Rules of Civil Procedure. Orc tenus provides that a trial court's findings of fact based on oral testimony have the effect of a jury's verdict and that judgment, grounded on such findings, is accorded, on appeal, a presumption of correctness which will not be disturbed unless plainly erroneous or manifestly unjust.

The official comments section to the rule admits Alabama Rule 52 conflicts with the circuits of Rule 52 of the Federal Rules of Civil Procedure. Alabama does not require written findings of fact or conclusions of law to support a jury or trial judge findings. The official comments indicates Alabama is in between *Orvis v. Higgins*, 180 F. 2d 537, 2nd Circuit Court of Appeals (1950) standard; and *Heim v. Universal Pictures Co.*, 154 F. 2d 480 2nd Circuit Court of Appeals (1946) standard; in its application of ore tenus. In Alabama a trial court or jury can remain silent and rule against a party without anyone knowing why or how the judgment or opinion was reached. Further, in such situations Alabama

appellant courts are required to assume the trial court made those findings necessary to support the decision. Such unbridled discretion may provide for impermissible judicial abuse and should require meaningful appellant court review. The troubling history of ore tenus in Alabama is outlined below.

The first known applications of the ore tenus rule were in Action for Services, Property and Probate cases where a judge decided the case based on oral testimony. There were clearly enough concerns about ore tenus that the state legislature enacted statutory laws to protect citizens from the rule.

In *Nelson v. Lamer*, 11 So. 294 (Ala. 1892); a promissory note case was reversed. *Nelson* begins:

> "Acts 1888--39, p. 569, i.e. 12, entitled "An act to establish the city court of Anniston," and requiring the appellate court to review the finding of that court on the evidence, when properly presented, without any presumption in favor of the said court, does not allow the appellate court, even where the evidence, when reduced to writing, seems evenly balanced, to consider the circumstance that the said court had the advantage of seeing and hearing the witnesses when they delivered their testimony, but the evidence must be considered solely as is it presented in the record."

Over the years, these acts to protect citizens have been removed from use after being ruled unconstitutional by the Alabama Supreme Court. The most recent act to be ruled unconstitutional was in 1991.

The phrase "ore tenus" was first used in 1894 in *Woodrow v. Hawving*, 120 So. 16, (Ala. 1894). An Action for Services case, *Woodrow* explains an act in Birmingham based on the same premise as *Nelson* (It also provides the first details about the ore tenus rule.

First, to explain the act in *Woodrow:*

> "The act establishing the city court of Birmingham provides that, on appeal, the supreme court shall review the conclusions and judgments of the city court, 'without any presumptions in favor of the rulings of the court below on the evidence, and, if there be error, shall render or reverse and remand as shall seem right."

Second, the ore tenus rule is explained:

> "If the primary court is charged with the duty of ascertaining and determining matters of fact dependent upon viva voce examination of witnesses, without the aid of a jury, there are obvious reasons for attaching to its findings, as this court has declared should be attached, the force and effect of the verdict of a jury,

> which cannot be disturbed unless it is plainly erroneous, opposed to all the evidence. The rule is not applied to the decision of a chancellor passing upon evidence wholly in writing..."

The application of ore tenus in 1894 is much different than how Alabama courts apply it today. In 1894 the appellant court considered all the evidence. Today, according to the Alabama Supreme Court in the case at bar, the court reviews only evidence in the most favorable light to the prevailing party.

In *Woodrow*, the Alabama Supreme Court indicated the "Rule" predates the "Act." The court said:

> "That the supreme court shall review the conclusions and judgments of the city court without any presumption in favor of the rulings of the court below on the evidence applies to cases where this court has before it all the legal evidence and data which were before the trial court; and that, where the witnesses are examined ore tenus the verdict, whether rendered by a jury, or by a court without the intervention of a jury, stands upon the same footing, and will not be disturbed here unless plainly erroneous."

In *Chandler v. Whatley*, 189 So. 751 (Ala. 1939), the Alabama Supreme Court reversed a child custody case that applied the ore tenus rule. The

court found that in dealing with child custody, the paramount interest is the future welfare of the child and that the law will not disregard the natural rights of the father. *Chandler* stressed that clear and convincing proof of parental unfitness was needed and the burden of proof was on the person contesting a parent's custodial rights.

The Alabama Supreme Court says:

> "This does not imply that in dealing with such delicate and often difficult question, the law disregards the natural rights of the father to custody, companionship, care and bringing up his child..."
>
> "Although this jurisdiction is firmly established, and seems indispensable to the morals, the good order, and the just protection of civilized society, it is admitted to be one of extreme delicacy, and of no inconsiderable embarrassment and responsibility. So strong is the presumption, that 'the care which is prompted by the parental instinct, and responded to by filial affection, is most valuable of all'; and so great is the reluctance of the court to separate a child of tender years from those who according to the ordinary laws of human nature, must feel the greatest affection for it, and take the deepest interest in its welfare, that the parental authority will not be interfered with, except in case of gross misconduct, or where, from other cause, the

> parent wants either the capacity or the means for the proper nurture and training of the child..."
>
> "Dealing with the fitness of the parent, (citation omitted), we find: 'The unfitness which deprives a parent of the right to the custody of a child must be positive, and not merely comparative or speculative, and must be shown by clear and satisfactory proof, the burden of proof being on the person contesting the parent's right to the custody. No inflexible rule can be laid down by which unfitness may be determined, but each case must be decided upon its own peculiar facts."

Esco v. Davidson, 308 So. 193 (Ala 1940), an ore tenus custody case that was reversed, involved a father and his eleven-year-old daughter. In *Esco*, the Alabama Supreme Court made clear that if the appellant court is convinced beyond any sort of doubt that the trial judge, when hearing oral testimony, erred in the decree as to the facts and in the application of 'sound principles of law' to the facts found in the record, it is the appellant court's duty to reverse.

Esco also highlighted another disturbing aspect of custody cases in Alabama. The court pointed out Alabama's policy - that holds valid today – that when a proceeding is instituted to determine the custody of a child, the child becomes a ward of the state, even if temporarily. *Children's Aid Society v. Davis*, 100 So 323. It can be argued that a child should truly be

considered a ward of the state only in threatening or highly disruptive circumstances. *Thorne v. Thorne*, 344 So.2d 165, (1977).

Other child custody cases involving ore tenus have been reversed, as well:

Greene v. Greene, 30 So. 2d 444 (Ala. 1947). The court said the parent seeking the custody change has the burden of proof to show change conditions or other substantial reasons. The court also ruled that custody is not res judicita, but is entitled weight in later proceedings.

Messick v. Messick, 735 So. 2d 547 (Ala. 1954). The court ruled that in child custody modification proceedings where custody has been decided, a material change of circumstances is first required.

Danford v. Durpree, 132 So. 2d 734, (Ala. 1961). The court again said parental unfitness must be by clear and convincing proof.

While the Alabama Supreme Court has been inconsistent in the application of the ore tenus rule, Alabama has stopped using the clear and convincing proof standard in parent v. parent cases.

Additionally, appellant review in ore tenus cases went from "review of all the evidence" to "review of evidence in the most favorable light to the prevailing

party."[5] The material change of circumstances standard is also applied inconsistently. For example, in *Cochran v. Cochran*, 5 So. 3d 1220 (Ala. 2008), the Alabama Supreme Court said the natural progression of a child is not a material change to warrant modification of custody, yet in the case at bar, the same justices said a natural progression is a material change to warrant a modification.

The latest of the legislative acts ruled as unconstitutional is explained in *Armstrong v. Roger's, Outdoor Sports*, 581 So 2d 414 (Ala. 1991).

In *Armstrong*, two early ore tenus cases are detailed as are the early acts enacted to guard and protect Alabama citizens from the ore tenus rule. See

[5] In other civil case law context, the Alabama Supreme Court in *United States Steel Corp. v. Mathews*, 73 So. 2d 239 (1954) pointed to another "rule" quoting *CE Adams & Co., v. Harrell*, 57 So. 2d 83 (Ala. 1952), at 85,

> "In treating these questions we are governed, of course, by the rule so often stated in this class of case that the finding of the trial court will not be disturbed where there is legal evidence which will support the trial court's finding. We are not concerned with the conflict in the evidence or the weight of the evidence. Our duty is simply to ascertain whether there was any legal evidence to sustain the conclusions of the trial court. *[Citations omitted]*."

The application of this rule was overruled in *Hammond v. City of Gadsden*, 493 So. 2d 1374, (Ala. 1986), but was arbitrarily not applied by Alabama courts in child custody cases. *Hammond* requires judges to list findings of fact to support their decision.

Hackett v Cash, 72 So. 52, 53 (Ala. 1916); and *Cobb v. Malone*, 9 So. 738 (Ala. 1891).

The Alabama Supreme Court ruled the act in *Armstrong* was unconstitutional in light of procedures they have in place to guard against unbridled discretion and its negative effects of violating due process.

The procedures explained in *Armstrong* are not applied in child custody cases, as such, the Alabama Supreme Court is denying parents meaningful appellant review without any due process safeguards guaranteed by the U.S. Constitution.

For the last 60 years, the Alabama Supreme Court has indicated in many opinions that when trial courts list no written findings to support a judgment, there is nothing the state's highest court can do. The justices suggested that if this lack of written findings was of significant concern, the legislature would enact law requiring them. For more than 110 years, the Alabama legislative branch has done just that, only to have the Alabama Supreme Court rule those acts as unconstitutional.

The Supreme Court of Alabama has the authority to create procedural due process safeguards to protect parents' and children's constitutional due process rights, and they refuse to do so. They have created procedural post-verdict standards in punitive awards cases, (*Hammond v. City of Gadsden*, 493 So. 2d 1374, (Ala. 1986); and *Green Oil Company v.*

Hornsby, 539 So. 2d 218 (Ala. 1989), but have refused to do so in parental rights cases.

In *Armstrong*, the *Hammond* standard and *Green* standard are explained in detail. Additionally, these standards were ruled in compliance to due process protections by the Supreme Court of the United States in *Pacific Mutual. Life Insurance Company. v. Haslip*, 499 US 1 (1991).

In *Hammond*, at 1379, the state high court said,

> "There are many facets of a trial that can never be captured in a record, so that the appellate courts are at a special disadvantage when they are called upon to review trial court action in this sensitive area, although increasingly they are required to do so. Therefore, it is not only appropriate, but indeed our duty, to require the trial courts to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages..."
>
> ...We do emphasize, however, that only where the record establishes that the award is excessive or inadequate as a matter of law, or where it is established and reflected in the record that the verdict is based upon bias, passion, corruption, or other improper motive may a trial court order a new trial or remittitur. Only by requiring that a record be made can this Court adequately discharge its

> role of appellate review of trial court action in either granting or refusing to grant a new trial where *remittitur* is granted or denied."

The *Green Oil Company* standard of review is about overcoming the presumption of correctness that is attached to the jury's award of punitive damages. This is relevant herein because the Petitioner moved the trial court for a directed verdict, which was denied, at the close of the Respondent's proof because there had been no material change of circumstances since the initial Tennessee order. At 220 in *Green Oil Company*, the Alabama Supreme Court said.

> "The decision of a trial court refusing to grant a new trial on the ground that the verdict is contrary to the great weight and preponderance of the evidence will not be reversed, unless, after allowing all reasonable presumptions of its correctness, the preponderance of the evidence against the verdict is so decided as to clearly convince the court that it is wrong and unjust. Quoting *Cobb v. Malone*, 497 So. 2d 471, (Ala. 1891)."

So in the case at bar, the Alabama Court of Civil Appeals, after careful review of all the evidence, including undisputed written opinions by the Tennessee courts and undisputed evidence that both the mother and father said the other parent was an excellent parent, ruled the trial court erred. Then, the Alabama Supreme Court in misapplication of

principles of law relied on unfounded assumptions and inferences.

This violates constitutional safeguards of due process when fundamental liberty interests hang in the balance. No other area of Alabama law allows for such use of ore tenus. And where the Alabama Supreme Court has the authority to correct this, it refuses to address the issue in parental rights cases.

Until this Court tells Alabama to stop violating parents' fundamental rights, any Alabama parent in the court system could suffer from abuse of discretion by a sole trial court judge issuing rulings without any legal basis in fact and, further, that parent could be denied meaningful appellant court review.

Makeup of the American family

The court in *Troxel v. Granville*, correctly stated,

> "The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household. As the Court knows family life for children in the 1950's is much different today."

Associational Rights and the Void for Vagueness Doctrine

Associational Rights of the Constitution, the U.S. Supreme Court in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), said,

> "The void-for-vagueness doctrine reflects the principle that "a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

Yet, this is exactly how Alabama's Child's Best Interest Standard and/or the ore tenus rule, which is not a statute, is applied in family law matters."

The Court in *Troxel v. Granville* (2000) said, the Due Process Clause of the Constitution does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a "better" decision could be made.

The Court also said, when a state court issues a legal judgment or opinion based on "mere assumption" because no written findings of fact were listed state courts have violated Due Process Rights of the Constitution.

Intimate Associations are a fundamental element of personal liberty and is the right to choose to enter into and maintain certain intimate human relationships. These intimate human relationships are known as "intimate associations." The paradigmatic "intimate association" is the family.

> "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."
>
> "This Court has repeatedly held that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly, and thereby invade the area of protected freedoms." The power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." ". . . Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."

A 1977 Alabama Court of Civil Appeals case, *Thorne v. Thorne*, is most revealing about precisely how and why the Alabama approach strays from the requirements of the U.S. Constitution. *Thorne v. Thorne*, 344 So.2d 165 (1977).

After a comprehensive review of the cases pertinent to the respective roles in an Alabama child custody case of a parent and the equity court as parens patriae, *Thorne v. Thorne*, at 168, the court

addressed how Alabama balances the due process to which a parent is entitled against the state's interest in protecting minor children.

In light of federal case precedents at the time, *Thorne v. Thorne*, at 169-170, the court acknowledged a parent has a constitutional right to due process, but only minimal due process.

Under Alabama state case precedents, the real power in an Alabama child custody case is the equity court as parens patriae, not the parent. The precise point when the Thorne court errs is when they find the state has a compelling interest in determining the best interest and welfare of all children in Alabama child custody cases, and the state's interest is superior to that of a fit parent.

"The public policy that the state has a compelling interest in determining the best interest and welfare of a child brought within the protective jurisdiction of its courts sitting in equity is beyond dispute." *Thorne v. Thorne*, at 170.

That thinking is seen in Alabama child custody cases to this day, and in light of subsequent U. S. Supreme Court cases on the fundamental nature of parental rights, the Alabama approach is flat wrong. When a child in a custody case has two fit, loving parents, there is no compelling state interest which triggers the use of parens patriae authority. The only constitutionally compliant role of the state in such a

case is to act in a de minimis way to reconcile the competing interests of the child's two, fit parents.

CONCLUSION

As society evolves so should the courts. The Alabama legislature has enacted laws the official policy of the state of Alabama for children to have both parents. The Supreme Court of Alabama instead relies on case law that predates both the 1997 and 2003 statutory law, Code of Alabama 30-3-150 *et seq.* and 30-3-160 *et seq.*

The Supreme Court of Alabama has treated this particular child custody issue, like it would have if Mark had never had a nurturing fatherly bond with Katie. (App. L, p. 152a). Katie is well-adjusted and thriving sharing life with both parents that live only 5 minutes apart.

This case is not about fighting for custody of Katie. It is about Katie having two active parents and for Katie to have a meaningful, frequent and substantial relationship with both parents. Equal parenting time with Katie was mandated in Tennessee and taken

away with no legal basis in fact in Alabama. Mark requests this Court protect parents' and children's fundamental liberty interests.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE CHANCERY COURT FOR LAWRENCE COUNTY, TENNESSEE

TONYA SMITH DAVIS,	)
Plaintiff	)
	)
vs.	) Civil Action No:
	) 10543-01
MARK DION DAVIS,	)
Defendant	)

FILED FOR RECORD
2002 FEB 15 AM 4 08
KRISTY GANG
CLERK AND MASTER
LAWRENCE CO. TENN

FINAL DECREE

This cause came to be heard on this 15th day of February, 2002, before the Honorable, Robert L. Jones, Judge while holding Chancery Court in and for Lawrence County, Tennessee, at Lawrenceburg, upon the petition for divorce, child custody, child support, alimony and attorney fees Pendente Lite. The testimony of the Parties and the entire record in this cause, from all of which it duly appeared to the Court, that the Parties should be and are Deemed divorce; pursuant to TCA 36-4-129b; that they have

divided the Martial assets and Martial Debts, in which the parties shall receive the property they now hold in their possession, except for the Wife's Engagement Ring and Wedding Band that will be returned to Husband. Further the parties shall be responsible for their own debts and hold the other harmless from the payment thereof. The court further finds that a child, Katie Nichole Davis was born during this marriage on 12-27-2001 after this divorce action was filed. The Court finds that this is the natural child of the father and holds such until or unless a pending DNA test result proves otherwise. An agreed upon DNA test was conducted on 2-11-2002 with results pending. Further the parties have entered into an agreed upon Parenting plan that is incorporated as Exhibit "A" of this judgement (sic) in which the child support is set at $545.00 per month , due on the 1st but payable on the 15th of each month directly to the mother. The Husband shall pay directly to the Mother $1,090.00 on 2-15-2002 for the months of January and February 2002 child support. The parties have agreed and it is so Ordered that the Mother shall keep the Child on her employer provided medical insurance and shall be reimbursed $9.75 per month from the Husband for the cost thereof. The parties shall be responsible for the 1/2 cost of the child's medical bills after the insurance have paid including deductibles. The Court finds that the parties have agreed to pay their own attorney's fee and the Court cost shall be divided equally between the parties.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

1. That the Parties are Deemed divorce; pursuant to TCA 36-4-129b; and that the parties be restored to all the rights and privileges of a single persons.

2. That the Parties have divided the Martial assets and Martial Debts, in which the parties shall receive the property they now hold in their possession, except for the Wife's Engagement Ring and Wedding Band that will be returned to Husband. Further the parties shall be responsible for their own debts and hold the other harmless from the payment thereof.

STATE OF TENNESSEE, LAWRENCE COUNTY,
I, the undersigned Clerk & Master, do
Hereby certify that this is a true and correct copy of the orginal of this instrument filed in this cause
This /s/ 19th day of /s/ January, 20 /s/ 06
/s/ S. Blackwood
CLEARK & MASTER

ENTERED
MINUTE BOOK /s/ 56 PAGE /s/ 268-269
KRISTY GANG, CLERK AND MASTER
BY: /s/ S. Blackwood

3. That the court further finds that a child, Katie Nichole Davis was born during this marriage on 12-27-2001 after this divorce action was filed. The Court finds that this is the natural child of the father and

holds such until or unless a pending DNA test result proves otherwise. An agreed upon DNA test was conducted on 2-11-2002 with results pending.

4. That the parties have entered into an agreed upon Parenting plan that is incorporated as Exhibit "A" of this judgement (sic) in which the child support is set at $545.00 per month, due on the 1st but payable on the 15th of each month directly to the mother. The Husband shall pay directly to the Mother $1,090.00 on 2-15-2002 for the months of January and February 2002 child support.

5. That the parties have agreed and it is so Ordered that the Mother shall keep the Child on her employer provided medical insurance and shall be reimbursed $9.75 per month from the Husband for the cost thereof.

6. That the parties shall be responsible for the 1/2 cost of the childs' medical bills after the insurance have paid including deductibles.

7. The Court finds that the parties have agreed to pay their own attorney's fee and the Court cost shall be divided equally between the parties.

8. That the wife's name shall be changed to he maiden name of Tonya Lynn Smith.

ENTERED this 15th day of February, 2002.

/s/

JUDGE, ROBERT L JONES

APPROVED FOR ENTRY:

/s/

GARY WILTON NUTT #016233
Attorney for Plaintiff
119 North Military Avenue Lawrenceburg, TN 38464
931-762-5434

/s/

WILLIAM M, HARRIS # 18688
Attorney for Defendant
P O Box 743
Lawrenceburg, TN 38468
931-766-0580

EXHIBIT A

IN THE CHANCERY COURT FOR LAWRENCE COUNTY, TENNESSEE

TONYA SMITH DAVIS,	)
PARENT	)
	)
	) Case No:
	) 10543 01
MARK DION DAVIS,	)
PARENT	)

FILED FOR RECORD
2002 FEB 15 AM 4 10
KRISTY GANG
CLERK AND MASTER
LAWRENCE CO. TENN

PERMANENT PARENTING PLAN

This plan is: X Ordered by the court on the 15th day of February, 2002.

__ is part of the Marital Dissolution agreement.

__ modifies an existing Parenting Plan or prior Court Order, date

Children:

Name	Birthday
Katie Nichole Davis	12/27/01

I. DECISION MAKING

A. DAY TO DAY DECISIONS

Each parent shall make decisions regarding the day-to-day care and control of each child while the child is residing with that parent. Regardless of the allocation of decision making in this parenting plan, either parent may make emergency decisions affecting the health or safety of the children.

B. CHILD NURTURE

Mother and Father will behave with respect to each other and the child so as to provide a loving, stable, consistent and nurturing relationship with the child even though they, themselves, are being divorced. Mother and Father agree they will not speak badly of each other or the members of the family of the other parent. They will encourage the child to continue to love the other parent and be comfortable in both new families.

C. MAJOR DECISIONS

Major decisions regarding each child shall be made as follows:

Education decisions ___ mother ___ father x joint

Non-emergency health care
mother ___ father x joint

Religious upbringing
mother ___ father x joint

Extracurricular activities
x mother ___ father ___ joint

_____
___ mother ___ father ___ joint

_____
___ mother ___ father ___ joint

D. PRIVATE SCHOOL AND COLLEGE: [Optional]

The parties agree as follows regarding private school [elementary and high school] and college or vocational training after high school:

Father and Mother to equally share expenses in college and/or vocational training after High School. The amount of tuition shall not exceed that of a state funded college or university. Receipts for child's expenses to be given to each parent for tuition, books, etc. and then split equally for payment.

II. RESIDENTIAL SHARING SCHEDULE

The schedule below sets out which parent has responsibility for the child during the week, weekends, holidays and vacations.

A. DAY TO DAY SCHEDULE

The mother will have responsibility for the care of the child except the following times and days when the father shall have responsibility for the care of the child:

From Sunday at 2:00 p.m. to Sunday at 4:00 p.m. From Tuesday at 6:00 p.m. to Tuesday at 8:00 p.m. and Thursday at 6:00 p.m. until Thursday at 8:00 p.m.

__X__ every week ___ every other week ___ other

Father shall have other such reasonable visitation as can be agreed upon by the parties.

Beginning 19th day of February, 2002.

B. SCHEDULE OF HOLIDAYS RELEVANT TO YOUR FAMILY, SCHOOL SCHEDULE or SPECIAL OCCASIONS. Indicate when child(ren) will be with each parent. (In ODD numbered years, EVEN numbered years or EVERY year.)

	Mother	Father
Martin Luther King Day*	E	O
Presidents' Day	E	O
Easter	E	O
Mother's Day	Every	____
Memorial Day (if no school)	E	O
Father's Day	____	Every
July 4th	O	____
Labor Day	O	____
Thanksgiving Day & Friday**	____	Every
Child's Birthday	1/2	1/2
Other school free days	E	O
Mother's Birthday	Every	
Father's Birthday	____	Every
Other:		

A holiday shall begin at 6:00 p.m. on the night preceding the holiday and end at 6:00 p.m. the night of the holiday unless otherwise noted.

*Father shall have the above stated visitation on MLK Day unless it fall upon child's sibling's birthday and in that event, Father

shall be given another day during the week to make up for the lost visitation.

**Mother shall have the child until 2:00 p.m. on Thanksgiving day and Father shall have the child From 2:00 p.m. until 8:00 p.m. until the child reaches the age of one year. After the child reaches the age of one, Mother shall have the child until 3:00 p.m. on Thanksgiving Day and Father shall have the child from 3:00 p on Thanksgiving Day until 6:00 p.m. the following day.

C. SCHEDULE FOR SPRING VACATION

The mother and father shall have equal time with the child during Spring Break when the child reaches school age.

D. SCHEDULE FOR WINTER HOLIDAY VACATION

Until the child reaches the age of two (2), the mother shall have the child up until Christmas Morning at 11:00 a.m. Father shall have the child from 11:00 a.m. until 6:00 p.m. the following day. After the child reaches the age of two (2) the mother shall have the child m from the day school is dismissed until December 25 at 12:00 p.m. The father will have the child from December 25 at 12:00 p m. until 6:00 p.m. the day before school starts back. The parties have further agreed that

mother shall have visitation with the child on New Year's Day every year from 12:00 p.m. until 6:00 p.m.

E. SUMMER SCHEDULE

The mother shall be responsible for the care of the child during the summer, except for the two (2) separate weeks when the father will be responsible for the care of the child, Father shall provide written notice of when he expects to exercise his extended parenting time by May 31st of each year.

F. TRANSPORTATION ARRANGEMENTS

Transportation arrangements for the child, between parents shall be as follows: Parents will meet at Joe Wheeler Dam for all exchanges of any visitation that exceeds two (2) hours duration.

III. FINANCIAL SUPPORT FOR CHILD(REN).

A. CHILD SUPPORT PER TENNESSEE GUIDELINES OR DEVIATIONS *

The father will pay child support, in accordance with the Tennessee Child Support Guidelines, in the amount of $545.00 per month, beginning the 15th

day of March, 2002. This support shall be paid directly to the other parent.

The parties affirmatively acknowledge that Court approval must be obtained before child support can be reduced or modified, unless such payments are automatically reduced or terminated under the terms of the Parenting Plan.

B. TAX DEDUCTION

The mother shall receive the tax deduction for the child in even years. The father shall receive the tax deduction for the child in odd year, so long as the child support is current on the 15th day of January of each year.

C. TAX RETURN NOTICE

The parent(s) paying child support shall send to the other parent by or before April 15 of every year [OR August 15, if an extension is sought], a copy of their respective W-2(s), I 099(s) and first two pages of their tax return.

D. HEALTH INSURANCE

The mother will maintain medical/hospital insurance on the

minor child through her current place of employment with father reimbursing mother for cost of insurance. Uncovered medical expenses, which include deductibles or co payments, eyeglasses, contact lenses, routine annual physicals, will be divided equally by the parties.

After insurance has paid its portion, the parent receiving the bill will send the bill to the other parent within 10 days. The other parent will pay his/her share within 30 days of receipt of the bill.

E. LIFE INSURANCE

The father shall insure his own life in the minimum amount of $50,000.00 term with the child as the irrevocable beneficiary of said policy.

The policy shall name the other parent as trustee of the funds to serve without bond or accounting, as beneficiary for the support.

F. DENTAL/ORTHODONTIC CARE

Father and mother shall share equally the dental/orthodontic expenses of the minor child. The parent receiving the

bill will send the bill to the other parent within 10 days. The other parent will pay his/her share within 30 days of receipt of the bill.

IV. DESIGNATION SOLELY FOR STATE AND FEDERAL STATUTES:

The children named in this parenting plan are scheduled to reside the majority of the time with the mother. SOLELY for purposes of any other state and federal statutes which require a designation or determination of parental responsibility, this parent is designated the "Custodian of the Child". If the parents are joint decision makers as listed in Section II for purposes of obtaining health or other insurance, they shall be considered "joint custodians." **THIS DESIGNATION SHALL NOT AFFECT EITHER PARENT'S RIGHTS AND RESPONSIBILITIES UNDER THIS PARENTING PLAN.**

V. DISAGREEMENTS ABOUT JOINT DECISIONS OR MODIFICATIONS OF PLAN

Should a disagreement arise about the Parenting Plan or the parties wish to modify the plan, the parties shall make a good faith effort to resolve the issue through the dispute resolution process, before returning to court.

Unless a limiting factor listed in T.C.A. 36-6-106 precludes a dispute resolution process prior to court action, or an emergency court action is necessary to protect the welfare of the child or a party, the parties agree to the following dispute resolution method.

Disputes between the parties, other than the child support disputes, shall be submitted to:

___Mediation by Rule 31 Mediator.

___Arbitration by arbitrator selected by parties or the court.

_X_Settlement Conference with judge not presiding in parents' case.

___Court process DUE TO ORDER OF PROTECTION OR RESTRICTIONS.

The cost of this process shall be assessed to the parties by the Court based upon their incomes. The out-of-court process shall be commenced by notifying the other party and the Court by ___written request _X_ certified mail ___Other_____.

In the dispute resolution process:

(a) Preference shall be given to carrying out this Parenting Plan.

(b) The parents shall use the designated process to resolve disputes relating to implementation of the plan.

(c) A written record shall be prepared of any agreement reached in the mediation, arbitration or settlement conference and shall be provided to each party to be drafted into a consent order of modification.

(d) If the court finds that a parent willfully failed to appear at a scheduled dispute resolution process without good reason, the court, upon motion, may award attorney fees and financial sanctions to the prevailing parent.

VI. STANDARD PARENTING ORDERS

Pursuant to Tennessee Code Annotated, § 36-6-101(a) both parents are entitled to the following rights:

1. To unimpeded telephone conversations with the child at least twice each week at reasonable times and for a reasonable duration;

2. To send mail to the child which the other parent shall not open and will not censor;

3. To receive notice and relevant information as soon as practical (but within 24 hours) in the event of hospitalization, major illness, or death of the child;

4. To receive directly from the school, upon written request, which includes a current mailing address and upon payment of reasonable costs of duplicating, copies of the child's report cards, attendance records, names of teachers, class schedules, standardized test scores, and any other records customarily made available to parents;

5. Unless otherwise provided by law, the right to receive copies of the child's medical, health or other treatment records directly from the physician or health care provider who provided such treatment or health care upon written request which contains a current mailing address and upon payment of reasonable costs of duplication; provided, that no person who receives the mailing address of a parent as a result of this requirement shall provide such address to the other parent or a third person.

6. To be free of derogatory remarks made about such parent or such parent's family by the other parent to or in the presence of the child.

7. To be given at least forty-eight (48) hours notice, whenever possible, of all extra-curricular activities, and the opportunity to participate or observe, including, but not limited to, the following:

   (i) School activities;
   (ii) Athletic activities;
   (iii) Church activities; and
   (iv) Other activities as to which parental participation or observation would be appropriate.

8. To receive from the other parent, in the event the other parent leaves the state with the minor child or children for more than two (2) days, an itinerary including telephone numbers for use in the event of an emergency.

9. Access and participation in education including the right of access to the minor child or children for lunch and other activities, on the same basis that is provided to all parents, provided the

participation or access is reasonable and does not interfere with day-to-day operations or with the child's educational performance.

SIGNATURE OF PARTY[IES] FOR PROPOSED PARENTING PLAN OR FOR FINAL PARENTING PLAN

I hereby make oath that this plan has been proposed in good faith and that it is in the best interests of the children

/s/ — */s/ 2-15-02 Lawrenceburg, TN*
Mother — Date and Place of Signature

/s/ — */s/ 2/15/2002 Lawrenceburg, TN*
Father — Date and Place of Signature

ORDER OF THE COURT

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Parenting Plan set forth above is adopted and approved as order of this court.

Enter this the 15th day of Feb., 2002.

/s/ Robert L. Jones
JUDGE

Presented by Counsel:

/s/ 01623
Signature BPR#
Name /s/ Gary Nutt
Address /s/ 119 North Military
/s/ Lawrenceburg TN 38464
Phone /s/ 931 762 5434

/s/ 18688
Signature BPR#
Name /s/ William M. Harris
Address /s/ PO Box 743
/s/ Lawrenceburg TN 38464
Phone /s/ (931) 766- 0580

Address of Mother
/s/ Tonya Davis
/s/ 101 Oakview St
/s/ Florence, AL 35633
Date Attended Parenting Seminar

Address of Father
/s/ Mark Davis
/s/ P.O. BOX 2081
/s/ Decatur AL 35602
Date Attended Parenting Seminar

(If applicable) Mediation Services provided by

APPENDIX B

IN THE CHANCERY COURT FOR LAWRENCE COUNTY, TENNESSEE

MARK DION DAVIS, Petitioner	)	
	)	No. 10543-01
vs.	)	
TONYA SMITH DAVIS Respondent	)	

FILED FOR RECORD
2003 3 AM 9 16
KRISTY GANG
CLERK AND MASTER
LAWRENCE CO. TENN

ORDER

This cause came to be heard on the 17th day of July and the 21st day of July, 2003, and based upon the testimony of witnesses in open court taking into account their credibility, demeanor and attitude, the pleadings, exhibits, representations of counsel and the record as a whole, the court finds that:

1. The previously filed motion to dismiss by respondent should be overruled.

2. That the Permanent Parenting Plan entered into by the parties in February of 2002 should be modified.

3. The court finds that both parties are in agreement that the previous Parenting Plan as it is not in the best interest of the minor child.

4. The court further finds that a modification is warranted and that it has considered the young age of the child, the stability of her relationship with both parents and the court notes that both parents are willing and able to care for and address the child's needs with regard to her physical, emotion and mental condition.

5. The court further finds that there is a lack of communication between the parties that is detrimental to the child and is not in the child's best interest.

STATE OF TENNESSEE, LAWRENCE COUNTY,
I, the undersigned Clerk & Master, do
Hereby certify that this is a true and correct copy of the orginal of this instrument filed in this cause
This /s/ 19th day of /s/ January, 20 /s/ 06
/s/ Sheila Workman
CLERK & MASTER

ENTERED

MINUTE BOOK /s/ 65 PAGE /s/ 96-99
KRISTY GANG, CLERK AND MASTER
BY: /s/ M. Methon

6. The court has noted that the best interest of the child in a situation is served by a parenting arrangement which best maintains a child's emotional growth, health, stability and physical care. The court notes there is a fundamental importance of the parent/child relationship to the welfare of the child and the relationship to the welfare of the child and the relationship between the child and each parent and that said relationship should be fostered unless inconsistent with the child's best interest. This being held, the court finds the child should be with each parent an equal amount of time. The court finds that the child should be with each parent on a four day rotating schedule (see attached Parenting Plan listed as Exhibit 1).

7. The court is impressed with the father, Mark Davis' actions to be involved in the life of his minor child. The court finds that there is nothing in the record that indicates the father does not provide nurturing and love to the minor child while in his care and control.

8. The court further finds that the parties would be well served by counseling, individually and collectively.

9. The court finds that this matter may reviewed at any time upon motion of either of the parties.

10. The court further finds that as the child will be staying 50% of the time with each parent thus there will be no child support due from either parent.

11. The court further finds that there will be no holiday schedule as each parent will have the child every four days. The court does find that it will expect the parties to be cooperative with regard to holidays, birthdays and family outings and that both parents will be cooperative and compromising with regard to trading days, again doing what is in the best interest of the child.

12. The court finds that neither parent should say anything disrespectful of the other but in fact should say things that are positive and reassuring to the child in that each parent does love the child and is desirous of doing what is best for the child.

13. The court finds that the mother shall have the child starting Monday, July 21, with the father receiving the child Friday, July 25, at 6:00 p.m. at the Wheeler Dam Store on Highway 72, being the place where the child will be exchanged. At that point, the father will have the child for four days after which

time, each parent will alternate four days with the meeting place being at 6:00 p.m. at the Wheeler Dam Store.

14. The court finds the court costs of this matter shall be split equally between the parties and that each party should bear their own attorney fees in this matter.

It is therefore, ORDERED, ADJUDGED AND DECREED that the previous Permanent Parenting Plan entered into between the parties in February, 2002, shall be modified as set out in the attached Permanent Parenting Plan, that being that each parent shall have four consecutive days after which time the child will revert to the other parent for four consecutive days. This schedule allows for each parent to have weekends with the minor child. There will be no holidays set out as each parent will have an equal amount of time with the minor child.

It is further ORDERED, ADJUDGED AND DECREED that both parties and the minor child will undergo counseling in Decatur, Alabama, which is covered by the mother's insurance. In the event said counseling is not covered by her insurance plan, Dr. James Cooper will provide the counseling. The cost of said counseling will be borne equally by the parties after payment by insurance (if applicable).

It is further ORDERED, ADJUDGED AND DECREED that this order may be reviewed at any time by motion of either party.

It is further ORDERED, ADJUDGED AND DECREED that in light of the minor child being with each parent 50% of the time, there will be no child support due from either parent. The previous arrangement with regard to insurance and health care will remain in effect, that being that the mother will provide insurance and the father will provide reimbursement for same. All remaining expenses with regard to medical, dental or related bills will be borne equally between the parties as set out in the Permanent Parenting Plan.

It is further ORDERED, ADJUDGED AND DECREED that the mother's visits shall start on Monday, July 21, 2003, and end at 6:00 on Friday, July 25, at which time she will deliver the minor child to the father at Wheeler Dam Store on Highway 72, at which time the visits with the child will alternate every four days with each parent as set out in the attached Permanent Parenting Plan.

It is further ORDERED, ADJUDGED AND DECREED that the court costs of this action will be equally divided between the parties and each party shall bear their own attorney fees in this matter.

It is further ORDERED, ADJUDGED AND DECREED that this court will retain jurisdiction of this matter this being in the best interest of the minor child.

ENTER this 3rd day of September, 2003.

/s/ _____ /
Stella Hargrove, Judge

APPROVED FOR ENTRY:
/s/ _____ /
RANDY HILLHOUSE #0059959
P. O. BOX 787
LAWRENCEBURG, TN 38464
931/762-1400
ATTORNEY FOR PLAINTIFF

/s/ _____ /
CHRISTOPHER V. SOCKWELL #016298
BOSTON, HOLT & SOCKWELL, PLLC
235 WATERLOO STREET
P. O. BOX 357
LAWRENCEBURG, TN 38464
931/762-7167
ATTORNEY FOR DEFENDANT

IN THE CHANCERY COURT FOR LAWRENCE COUNTY, TENNESSEE

TONYA SMITH DAVIS	)
PARENT	)
	) Case No.
	) 10543-01
MARK DION DAVIS	)
PARENT	)

RECEIVED
OCT – 8 2003
3:20 PM
BY: /s/ m. methon

PERMANENT PARENTING PLAN

This plan is: ___ Ordered by the court on the ___ day of ___ 20___,
is a part of the Marital Dissolution agreement,
X modifies an existing Parenting Plan or prior Court Order, dated, ___ day of ___, 20__.

Children:

Name	Birthday
Katie Nichole Davis	12-27-01

I. DECISION MAKING

A. DAY TO DAY DECISIONS

Each parent shall make decisions regarding the day-to-day care and control of each child while the child is residing with that parent. Regardless of the allocation of decision making in this parenting plan, either parent may

make emergency decisions affecting the health or safety of the children.

B. CHILD NURTURE

Mother and Father will behave with respect to each other and the child so as to provide a loving, stable, consistent and nurturing relationship with the child even though they, themselves, are being divorced. Mother and Father agree they will not speak badly of each other or the members of the family of the other parent. They will encourage the child to continue to love the other parent and be comfortable in both new families.

C. MAJOR DECISIONS

Major decisions regarding each child shall be made as follows:

Education decisions:
__mother__ father X joint

Non-emergency healthcare:
__mother__ father X joint

Religious upbringing:
__ mother __ father X joint

Extracurricular activities
___ mother ___ father X joint

_____
___ mother ___ father ___ joint

_____
___ mother ___ father ___ joint

D. PRIVATE SCHOOL AND COLLEGE: [Optional]

The parties agree as follows regarding private school [elementary and high school] and college or vocational training after high school:

Father and Mother to equally share expenses in college and/or vocational training after High School. The amount of tuition shall not exceed that of a state funded college or university. Receipts for child's expenses to be given to each parent for tuition, books, etc. and then split equally for payment.

II. RESIDENTIAL SHARING SCHEDULE

The schedule below sets out which parent has responsibility for the child during the week, weekends, holidays and vacations.

A. DAY TO DAY SCHEDULE

The ___ mother ___ father will have responsibility for the care of the child except the following times and days when the father shall have responsibility for the care of the child(ren): The Court finds that the child shall be with each parent on a four (4) day rotating schedule starting with the mother on Monday, July 21, 2003.

B. SCHEDULE OF HOLIDAYS RELEVANT TO YOUR FAMILY, SCHOOL SCHEDULE or SPECIAL OCCASIONS.

Indicate when child(ren) will be with each parent. (In ODD numbered years, EVEN numbered years or EVERY year.)

The parties will have the child on a rotating four (4) schedule.

	Mother	Father
Martin Luther King Day*	_____	_____
Presidents' Day	_____	_____
Easter	_____	_____
Mother's Day	_____	_____
Martin Luther King Day	_____	_____
President's Day	_____	_____
Easter	_____	_____

Passover	_____	_____
Mother's Birthday	_____	_____
Memorial Day (if no school)	_____	_____
Father's Birthday	_____	
July 4th	_____	_____
Labor Day	_____	_____
Thanksgiving Day & Friday	_____	
Child(ren)'s Birthday	_____	_____
Other school- free days	_____	_____
Mother's Birthday	_____	_____
Father's Birthday	_____	_____
New Years Day	_____	_____
Other:	_____	_____

C. SCHEDULE FOR SPRING VACATION

D. SCHEDULE FOR WINTER HOLIDAY VACATION

E. SUMMER SCHEDULE

Same as school year schedule.

F. TRANSPORTATION ARRANGEMENTS

Transportation arrangements for the child(ren), between parents shall be as follows: The parents will meet at Joe Wheeler Dam for all exchanges.

G. **OTHER:**

The following special provisions apply to the schedule or residential considerations of the child(ren):

III. FINANCIAL SUPPORT FOR CHILD(REN).

A. CHILD SUPPORT PER TENNESSEE GUIDELINES OR DEVIATIONS *

Neither party shall pay the other party any child support.

The __ mother __father will pay child support, in accordance with the Tennessee Child Support Guidelines, in the amount of $ __ per ___ week ___ month,___twice per month (semimonthly, or___every two weeks (bi-weekly), plus $_____as 5% clerks fee [if applicable] for a total amount of $_____ beginning the _____day of ____, 20 __, Deviations:

This support shall be paid

___Directly to the other parent.

___To the Central Child Support Receipting Unit, P.O. Box 305200, Nashville, TN 37229, and sent to the other parent.

Address: _____

___Direct Deposit to the other parent at _____ Bank.

____By Wage Assignment Order [Attach Order]

The parties affirmatively acknowledge that Court approval must he obtained before child support can be reduced or modified, unless such payments are automatically reduced or terminated under the terms of the Parenting Plan.

* Attach sworn statement of income if this is a Proposed Plan.

B. TAX DEDUCTION

The mother shall receive the tax deduction for the child in all even years. The father shall receive the tax deduction for the child in all odd years.

C. TAX RETURN NOTICE

The parent(s) paying child support shall send to the other parent by or before April 15 of every year [OR August 15, if an extension is sought], a copy of their respective W-2(s), I 099(s) and first two pages of their tax return.

D. HEALTH INSURANCE

The mother will maintain medical/hospital insurance on the minor child through her current place of employment with father reimbursing mother for cost of insurance. Uncovered medical expenses, which include deductibles or co-payments, eyeglasses, contact lenses, routine annual physicals, will be divided equally by the parties. After insurance has paid its portion, the parent receiving the bill will send the bill to the other parent within TEN (10) DAYS. The other parent will pay his/her share within THIRTY (30) DAYS of receipt of the bill.

E. LIFE INSURANCE [OPTIONAL FOR PARENT NOT PAYING CHILD SUPPORT]

The X Father shall insure his own life in the minimum amount of $50,000.00

term with the child as the irrevocable beneficiary of said policy.

The ____ mother shall insure her own life in the minimum amount of $_____, while or term.

The policies shall name the X other parent OR ___ other parent as trustee of the funds to serve without bond or accounting, as beneficiary for the support of the minor child.

F. DENTAL/ORTHODONTIC CARE

The mother and father shall share equally the dental/orthodontic expenses of the minor child. The parent receiving the bill will send the bill to the other parent within TEN (10) DAYS. The other parent will pay his/her share within THIRTY (30) DAYS of receipt of the bill.

IV. DESIGNATION SOLELY FOR STATE AND FEDERAL STATUTES:

The children named in this parenting plan are scheduled to reside the majority of the time with the ____mother____father. SOLELY for purposes of any other state and federal statutes which require a designation or

determination of parental responsibility, this parent is designated the "Custodian of the Child". If the parents are joint decision makers as listed in Section II. for purposes of obtaining health or other insurance, they shall be considered "joint custodians." **THIS DESIGNATION SHALL NOT AFFECT EITHER PARENT'S RIGHTS AND RESPONSIBILITIES UNDER THIS PARENTING PLAN.**

V. DISAGREEMENTS ABOUT JOINT DECISIONS OR MODIFICATIONS OF PLAN

Should a disagreement arise about the Parenting Plan or the parties wish to modify the plan, the parties shall make a good faith effort to resolve the issue through the dispute resolution process, before returning to court.

Unless a limiting factor listed in T.C.A. 36-6-106 precludes a dispute resolution process prior to court action, or an emergency court action is necessary to protect the welfare of the child or a party, the parties agree to the following dispute resolution method:

Disputes between the parties, other than the child support disputes, shall be submitted to:

___Mediation by Rule 31 Mediator.

___Arbitration by arbitrator selected by parties or the court.

__X__ Settlement Conference with judge not presiding in parents' case.

___Court process DUE TO ORDER OF PROTECTION OR RESTRICTIONS.

The cost of this process shall be assessed to the parties by the Court based upon their incomes. The out-of-court process shall be commenced by notifying the other party and the Court by ___written request __X__ certified mail ___Other_____:

In the dispute resolution process:

(a) Preference shall be given to carrying out this Parenting Plan.

(b) The parents shall use the designated process to resolve disputes relating to implementation of the plan.

(c) A written record shall be prepared of any agreement reached in the mediation, arbitration or settlement conference and shall be provided to each party to be drafted into a consent order of modification.

(d) If the court finds that a parent willfully failed to appear at a scheduled dispute

resolution process without good reason, the court, upon motion, may award attorney fees and financial sanctions to the prevailing parent.

VI. STANDARD PARENTING ORDERS

Pursuant to Tennessee Code Annotated, § 36-6-101(a) both parents are entitled to the following rights:

1. To unimpeded telephone conversations with the child at least twice each week at reasonable times and for a reasonable duration;

2. To send mail to the child which the other parent shall not open and will not censor;

3. To receive notice and relevant information as soon as practical (but within 24 hours) in the event of hospitalization, major illness, or death of the child;

4. To receive directly from the school, upon written request, which includes a current mailing address and upon payment of reasonable costs of duplicating, copies of the child's report cards, attendance records, names of

teachers, class schedules, standardized test scores, and any other records customarily made available to parents.

5. Unless otherwise provided by law, the right to receive copies of the child's medical, health or other treatment records directly from the physician or health care provider who provided such treatment or health care upon written request which contains a current mailing address and upon payment of reasonable costs of duplication; provided, that no person who receives the mailing address of a parent as a result of this requirement shall provide such address to the other parent or a third person.

6. To be free of derogatory remarks made about such parent or such parent's family by the other parent to or in the presence of the child.

7. To be given at least forty-eight (48) hours notice, whenever possible, of all extra-curricular activities, and the opportunity to participate or observe, including, but not limited to, the following:

(i) School activities;
(ii) Athletic activities,

(iii) Church activities; and

(iv) Other activities as to which parental participation or observation would be appropriate.

8. To receive from the other parent, in the event the other parent leaves the state with the minor child or children for more than two (2) days, an itinerary including telephone numbers for use in the event of an emergency.

9. Access and participation in education including the right of access to the minor child or children for lunch and other activities, on the same basis that is provided to all parents, provided the participation or access is reasonable and does not interfere with day-to-day operations or with the child's educational performance.

SIGNATURE OF PARTY[IES] FOR PROPOSED PARENTING PLAN OR FOR FINAL PARENTING PLAN

I hereby make oath that this plan has been proposed in good faith and that it is in the best interests of the children.

_____ _____

Mother Date and Place of Signature

SWORN TO AND SUBSCRIBED BEFORE ME THIS ____ OF _____, 20____.

_____ _____

My Commission Expires: Notary Public

_____ _____

Father Date and Place of Signature

SWORN TO AND SUBSCRIBED BEFORE ME THIS ____ OF _____, 20____.

_____ _____

My Commission Expires: Notary Public

ORDER OF THE COURT

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Parenting Plan set forth above is adopted and approved as order of this court.

Dated: 10 - 09 - 03

/s/ Stella Hargove
JUDGE

Presented by Counsel:

/s/ _____ /

Signature BPR#
Name Randy Hillhouse, # 5959
Address PO Box 787
Lawrenceburg TN 38464
Phone (931) 762-1400

/s/ /
Signature BPR#
Name Christopher V. Sockwell
Address PO Box 357
Lawrenceburg TN 38464
Phone (931) 762-1400

Address of Mother

151 Leona Drive
Florence, AL 35633

Date Attended Parenting Seminar

Address of Father

Date Attended Parenting Seminar

(If applicable) Mediation Services provided by:

FILED FOR RECORD
2003 OCT 9 9 AM 8 55

KRISTY GANG
CLERK AND MASTER
LAWERENCE CO .TENN

APPENDIX C

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 7, 2004 Session

MARK DION DAVIS v. TONYA SMITH DAVIS

Appeal from the Chancery Court for Lawrence County
No. 10543-01 Stella L. Hargrove, Judge

MARK DION DAVIS v. TONYA SMITH DAVIS

Appeal from the Chancery Court for Lawrence County No. 10543-01 Stella L. Hargrove, Judge

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No. M2003-02312-CO-R3-CV - Filed
September 27, 2004

This appeal concerns a dispute over the custody of a child who is less than three years old. Within four months after the parents' divorce in the Chancery Court for Lawrence County, the father filed a petition to modify the permanent parenting plan because the mother was obstructing and discouraging his visitation with the child. Following a bench trial, the trial court determined that the wife's

post-divorce conduct amounted to a material change in circumstances and that the parents should have equal residential time with the child. The trial court also relieved the father of his child support obligation in light of the change in the permanent parenting plan. The mother has appealed both the change in the permanent parenting plan and the termination of her child support. While we affirm the trial court's decision to award the parents equal residential time, we vacate the decision with regard to child support.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part and Vacated in Part

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN and PATRICIA J. COTTRELL, JJ., joined.

Randy Hillhouse, Lawrenceburg, Tennessee, for the appellant, Tonya Smith Davis. Christopher V. Sockwell, Lawrenceburg, Tennessee, for the appellee, Mark Dion Davis.

OPINION

I.

Mark Davis and Tonya Smith Davis ("Ms. Smith") married on November 11, 2000 and separated four months later. Before their separation, the couple conceived a child, Katie Davis, who was born on December 27, 2001. They were divorced in the

Chancery Court for Lawrence County in February 2002. The permanent parenting plan they entered into at that time allowed Ms. Smith to care for Katie at all times except for two hours each Sunday, Tuesday, and Thursday, certain holidays, two weeks during each summer, and at other such times as both parties agreed. The parenting plan further provided that all major decisions regarding education, non-emergency health care, and religion would be made jointly.

Despite the spirit of cooperation reflected in the permanent parenting plan, Ms. Smith quickly set about obstructing Mr. Davis's efforts to nurture his relationship with Katie. In June 2002, Mr. Davis filed a petition in the Chancery Court for Lawrence County asserting that Ms. Smith had denied him reasonable visitation opportunities and had refused to consult with him when making major decisions concerning Katie. He alleged that Ms. Smith had refused to allow him the two weeks of summer visitation. Mr. Davis also asserted that while Ms. Smith was at work she insisted on placing Katie in daycare even though he was available to care for Katie during the day. In addition, he alleged that Ms. Smith made major decisions without consulting him, including choosing Katie's daycare and physician. Because of Ms. Smith's efforts to exclude him from Katie's life, Mr. Davis requested either to have equal parenting time with Katie or to be designated as the primary residential parent.

Ms. Smith denied Mr. Davis's allegations and filed a counter-petition, which she withdrew at trial,

alleging that she had concerns as to Mr. Davis's parenting ability. She sought a home study, counseling, increased child support, and a restraining order against Mr. Davis to prevent him from coming to her work, church, and Katie's doctor's office and daycare. Ms. Smith accused Mr. Davis of exhibiting strange, disruptive, and harassing behavior around Katie. She also filed a motion to dismiss Mr. Davis's petition to modify the parenting plan.

The trial court declined to dismiss Mr. Davis's petition and conducted a hearing in July 2003. During the hearing, both parties stated that the original parenting plan was not in Katie's best interests. Accordingly, the court awarded equal parenting time to Ms. Smith and Mr. Davis on an alternating four-day schedule and terminated Mr. Davis's child support obligation accordingly. After noting that it was impressed with Mr. Davis's desire to be involved in Katie's life, the court observed that the parties' inability to communicate effectively was not in Katie's best interests and recommended individual and group counseling. On this appeal, Ms. Smith takes issue with the trial court's decisions to modify the permanent parenting plan and to terminate her child support.

II.
THE STANDARD OF REVIEW

Custody and visitation decisions are among the most important decisions that courts make. *Steen v.*

Steen, 61 S.W.3d 324, 327 (Tenn. Ct. App. 2001); *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 484 (Tenn. Ct. App. 1997). Their chief purpose is to promote the child's welfare by creating an environment that promotes a nurturing relationship with both parents. *Aaby v. Strange*, 924 S.W.2d 623, 629 (Tenn. 1996).

Children thrive in stable environments. Aaby v. Strange, 924 S.W.2d at 627; National Interdisciplinary Colloquium on Child Custody, Legal and Mental Health Perspectives on Child Custody Law: A Deskbook for Judges § 5:1, at 51 (1998) ("Legal and Mental Health Perspectives on Child Custody Law"). Accordingly, the courts favor existing custody arrangements. Taylor v. Taylor, 849 S.W.2d 319, 332 (Tenn. 1993); Hoalcraft v. Smithson, 19 S.W.3d 822, 828 (Tenn. Ct. App. 1999). In fact, a custody decision, once made and implemented, is considered res judicata upon the facts in existence or reasonably foreseeable when the decision was made. Young v. Smith, 193 Tenn. 480, 485, 246 S.W.2d 93, 95 (1952); Steen v. Steen, 61 S.W.3d at 327; Solima v. Solima, 7 S.W.3d 30, 32 (Tenn. Ct. App. 1998).

Despite a preference for continuing existing custody arrangements, the courts have recognized that the circumstances of children and their parents change. Accordingly, our statutes and decisions empower the courts to alter custody arrangements when intervening circumstances require modifications. Tenn. Code Ann. § 36-6-101(a)(1) (Supp. 2003). Thus, courts may modify an existing

custody arrangement when required by unanticipated facts or subsequently emerging conditions. *Smith v. Haase*, 521 S.W.2d 49, 50 (Tenn.1975); *Adelsperger v. Adelsperger*, 970 S.W.2d at 485. In the interests of stability in the child's life, a court should not alter an existing custody arrangement until (1) it is satisfied either that the child's circumstances have changed in a material way since the entry of the presently operative custody decree or that a parent's circumstances have changed in a way that affects the child's well-being, (2) it has carefully compared the current fitness of the parents to be the child's custodian, and (3) it has concluded that changing the existing custody arrangement is in the child's best interests. *Kendrick v. Shoemake*, 90 S.W.3d 566, 570 (Tenn. 2002); *Blair v. Badenhope*, 77 S.W.3d 137, 150 (Tenn. 2002).

There are no bright line rules for determining when a change of circumstances should be deemed material enough to warrant changing an existing custody arrangement. *Kendrick v. Shoemake*, 90 S.W.3d at 570; *Taylor v. Taylor*, 849 S.W.2d at 327; *Solima v. Solima*, 7 S.W.3d at 32. These decisions turn on the unique facts of each case. As a general matter, however, the following principles illuminate the inquiry. First, the change of circumstances must involve either the child's circumstances or a parent's circumstances that affect the child's well-being. *Kendrick v. Shoemake*, 90 S.W.3d at 570. Second, the changed circumstances must have arisen after the entry of the custody order sought to be modified. *Turner v. Turner*, 776 S.W.2d 88, 90 (Tenn. Ct. App. 1989). Third, the changed circumstances

must not have been reasonably anticipated when the underlying decree was entered. *Adelsperger v. Adelsperger*, 970 S.W.2d at 485. Fourth, the change in circumstances must affect the child's well-being in some material way. *Kendrick v. Shoemake*, 90 S.W.3d at 570; *Blair v. Badenhope*, 77 S.W.3d at 150; *Hoalcraft v. Smithson*, 19 S.W.3d at 829.

The person seeking to change an existing custody arrangement has the burden of demonstrating both that the child's circumstances have changed materially and that the best interests of the child require a change in the existing custody arrangement. *In re Bridges*, 63 S.W.3d 346, 348 (Tenn. Ct. App. 2001); *Musselman v. Acuff*, 826 S.W.2d 920, 922 (Tenn. Ct. App. 1991). The threshold question is whether there has been a material change in the child's circumstances. *Kendrick v. Shoemake*, 90 S.W.3d at 570; *Blair v. Badenhope*, 77 S.W.3d at 150; *Placencia v. Placencia*, 48 S.W.3d 732, 736 (Tenn. Ct. App. 2000). If the person seeking the change of custody cannot demonstrate that the child's circumstances have changed in some material way, the trial court should not re-examine the comparative fitness of the parents, *Caudill v. Foley*, 21 S.W.3d 203, 213 (Tenn. Ct. App. 1999), or engage in a "best interests of the child" analysis. Rather, in the absence of proof of a material change in the child's circumstances, the trial court should simply decline to change custody. *Hoalcraft v. Smithson*, 19 S.W.3d at 828.

Custody and visitation decisions often hinge on subtle factors, including the parents' demeanor and credibility during the divorce proceedings themselves. *Adelsperger v. Adelsperger*, 970 S.W.2d at 485. Accordingly, trial courts have broad discretion to fashion custody and visitation arrangements that best suit the unique circumstances of each case. *Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn. 1999); Suttles v. Suttles, 748 S.W.2d 427, 429 (Tenn. 1988); Helson v. Cyrus, 989 S.W.2d 704, 707 (Tenn. Ct. App. 1998). It is not our role to "tweak [these decisions] . . . in the hopes of achieving a more reasonable result than the trial court." *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001).

However, trial courts must base their custody and visitation decisions on the evidence and on an appropriate application of the relevant legal principles. *D v. K*, 917 S.W.2d 682, 685 (Tenn. Ct. App. 1995). Thus, we review these decisions de novo on the record with a presumption that the trial court's findings of fact are correct unless the evidence preponderates otherwise. *Nichols v. Nichols*, 792 S.W.2d 713, 716 (Tenn. 1990); *Swett v. Swett*, No. M1998-00961-COA-R3-CV, 2002 WL 1389614, at *5 (Tenn. Ct. App. June 27, 2002) (No Tenn. R. App. P. 11 application filed); Tenn. R. App. P. 13(d). A trial court's decision regarding custody or visitation should be set aside only when it "falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record." *Eldridge v. Eldridge*, 42 S.W.3d at 88.

III.
THE MODIFICATION OF THE RESIDENTIAL SCHEDULE

Ms. Smith takes issue with the trial court's decision to modify the residential schedule on two grounds. First, she asserts that no material change of circumstances has occurred that would require a change in the residential schedule. Second, she insists that even if the circumstances had materially changed, giving the parties equal parenting time was not in Katie's best interest. We disagree with both arguments.

A parent's failure to adhere to the requirements of a permanent parenting plan can be considered a material change in circumstances. Tenn. Code Ann. § 36-6-101(a)(2)(B) (Supp. 2003). This record contains abundant evidence that Ms. Smith has refused to adhere to the plain requirements of the parenting plan and that she has purposely and deliberately embarked on a course which, if not stopped, would eventually erode the relationship between Mr. Davis and Katie. Accordingly, we find that the trial court's conclusion that the circumstances had changed materially following the divorce is amply supported by the record.

Ms. Smith also asserts on appeal that Mr. Davis presented no evidence to show that a change in residential schedule would be in Katie's best interests. While both parties agreed at trial that the permanent parenting plan was not working and that it should be

modified, Ms. Smith insists that the only change that was warranted was to give Mr. Davis increased visitation time. She argues that the trial court went too far when it decided to grant the parties equal parenting time. Again, we disagree.

The trial court considered such factors as Katie's young age, the stability of her relationship with both parents, and the willingness and ability of both parents to care for and address her needs. The court noted that Katie's relationships with both parents should be fostered unless inconsistent with Katie's best interests. The trial court found no such inconsistency and, in fact, concluded that it had discovered "nothing in the record that indicates the father does not provide nurturing and love" to Katie while she is in his care and control. After careful review of the record, this Court finds no basis upon which to hold that the equal parenting plan is not presently in Katie's best interests.

During oral argument, this court expressed some concern about the long-term viability of the revised residential schedule because the parents are currently living in different cities that are more than one hour's drive apart. Shuttling Katie back and forth every four days will no longer be in her best interests when she begins school. Ms. Smith insists that these potential difficulties provide a sufficient basis to vacate the revised residential schedule and to designate her as the primary residential parent. We respectfully disagree. Courts must base their decisions on the evidence of what has already

happened, not on speculation about what might happen in the future. These parents have the power to avoid these potential difficulties by working out a mutually satisfactory parenting arrangement once Katie begins school.

IV.

THE TERMINATION OF MR. DAVIS'S CHILD SUPPORT

Ms. Smith also takes issue with the trial court's decision to relieve Mr. Davis of his child support obligation. She asserts that the trial court erred because Mr. Davis had not requested the court to modify his child support and because the parties did not present evidence regarding the factors relevant to child support modifications. While the trial court's decision to terminate Mr. Davis's child support obligation had a sound legal foundation when it was made, a recent Tennessee Supreme Court decision requires us to remand the case for further proceedings regarding child support. *See Hopkins v. Hopkins*, ___ S.W.3d ___, ___, 2004 WL 2151200 (Tenn. 2004).

When the trial court conducted the July 2003 hearing, the prevailing view was that only a parent who spent a greater amount of time with his or her child was entitled to receive child support. *Gray v. Gray*, 78 S.W.3d 881, 884 (Tenn. 2002). Accordingly, this court had held on at least two prior occasions that neither parent is entitled to child support when (1) neither parent is designated as the primary residential parent and (2) the residential schedule

grants the parents equal parenting time. *Cox v. Cox*, No. E2002-020340COA-R3-CV, 2003 WL 1797944, at *4 (Tenn. Ct. App. Mar. 31, 2003) (No Tenn. R. App. P. 11 application filed); *Baily v. Capps*, No. M1999 02300 COA R3- CV, 2001 WL 310643, at *4 (Tenn. Ct. App. Apr. 2, 2001) (No Tenn. R. App. P. 11 application filed). Because the trial court had awarded Mr. Davis and Ms. Smith precisely equal parenting time, neither one of them was entitled to child support under the law as it stood at that time.

On the same day that this court filed its original opinion in this case, the Tennessee Supreme Court handed down an opinion that changed the law with regard to the effect that an award of equal parenting time has on the parents' child support obligations. The court "decline[d] to adopt a bright-line rule that no child support is owed when a child's residential time is divided equally between the parents." *Hopkins v. Hopkins*, ___ S.W.3d ___, ___, 2004 WL 2151200, at *2 (Tenn. 2004). This holding undermines the continuing validity of *Cox v. Cox* and *Baily v. Capps* and requires us to withdraw our original opinion.

Hopkins v. Hopkins involves two working parents with significantly different salaries. Victor Hopkins's annual income was more than twice as much as Synthia Hopkins's income. When they

were divorced in July 2002, the trial court determined that their children would reside with

Mr. Hopkins for 235 days a year and directed Ms. Hopkins to pay Mr. Hopkins $681 per month in child support. On appeal, Ms. Hopkins asserted that the trial court had awarded Mr. Hopkins too much residential time. This court agreed and determined that the children's best interests would be best served by dividing their physical custody equally between the parents. We also decided that Mr. Hopkins should pay Ms. Hopkins $800 per month in child support to equalize the resources available to the children. Tenn. Comp. R. & Regs. r. 1240-2-4-.02(2)(e) (2003).

Mr. Hopkins filed a Tenn. R. App. P. 11 application seeking review of this court's decision to require him to pay Ms. Hopkins $800 per month in child support. The Tennessee Supreme Court first concluded that awarding equal parenting time is "permissible."[1] Then, turning to the issue of child support, the court held (1) that determining the amount of child support must be done on a case by-case basis when the parents have equal parenting time,[2] (2) that reducing child support to zero was permissible, but not necessarily required, when parenting time is divided equally,[3] (3) that only parents designated as the primary residential parent are entitled to receive child support,[4] and (4)

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[1] *Hopkins v. Hopkins* , 2004 WL 2151200, at *2.

[2] *Hopkins v. Hopkins* , 2004 WL 21512000, at *2.

[3] *Hopkins v. Hopkins* , 2004 WL 21512000, at *2; Gray v. Gray, 78 S.W.3d at 884.

[4] *Hopkins v. Hopkins* , 2004 WL 21512000, at *3; Gray v. Gray, 78 S.W.3d at 884.

that the courts must designate one of the parents as the primary residential parent in every case, even when the parents have been awarded equal parenting time.[5] Applying these principles to the facts of the Hopkins case, the court overturned our decision to require Mr. Hopkins to pay Ms. Hopkins $800 per month in child support solely because we had not designated Ms. Hopkins as the primary residential parent. The court then remanded the case with directions to enter a parenting plan designating a primary residential parent and calculating child support. *Hopkins v. Hopkins,* 2004 WL 2151200, at *3.

Once the Tennessee Supreme Court has addressed an issue, its decision regarding that issue is binding on the lower courts. *State v. Irick*, 906 S.W.2d 440, 443 (Tenn. 1995); *Payne v. Johnson*, 2 Tenn. Cas. (Shannon) 542, 543 (1877). Thus, this court is bound to adhere to the decisions of the Tennessee Supreme Court. *Bing v. Baptist Mem'l Hosp.*, 937 S.W.2d 922, 925 (Tenn. Ct. App. 1996); *Schultz' Estate v. Munford, Inc.*, 650 S.W.2d 37, 39

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[5] *Hopkins v. Hopkins,* 2004 WL 21512000, at *2, 3. A dissenting justice characterized this holding as "contrived." *Hopkins v. Hopkins*, 2004 WL 21512000, at *4 (Barker, J., dissenting). We confess our inability to understand how a parent who has been awarded 50% of the parenting time can be designated as a primary residential parent in light of Tenn. Code Ann. § 36-6-402(4) (2001) which defines "primary residential parent" as "the parent with whom the child spends more than fifty percent (50%) of the time." If a child is residing with a parent for 50% of the time, that same child cannot be spending more than 50% of the time with that same parent.

(Tenn. Ct. App. 1982). The court has even admonished us that we are not free to disregard its dictum when the court is speaking directly on the matter before it and it is seeking to give guidance to the bench and bar. Holder v. Tennessee Judicial Selection Comm'n, 937 S.W.2d 877, 881-82 (Tenn. 1996).

We are bound to follow *Hopkins v. Hopkins* despite the practical difficulties that will surely follow in its wake.[6] Accordingly, we conclude that the trial court erred first by failing to designate either Mr. Davis or Ms. Smith as the primary residential parent and second by basing its child support decision solely on the fact that the parents had equal residential time. We, therefore, vacate the portion of the trial court's final order regarding child support and remand the case to the trial court with directions to designate a primary residential parent and to address the question of child support as required by the *Hopkins v. Hopkins*.

V.

We affirm the portion of the judgment granting the parents equal residential time. We vacate the portion

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[6] When parents have been granted equal parenting time, the designation as "primary residential parent" will become a hotly contested issue because of the perception that it might have some future value. Parents who might otherwise be inclined to pay child support to equalize the resources available to their children will no longer offer to do pay support because it will necessarily result in the other parent being designated as the primary residential parent.

of the judgment terminating Mr. Davis's child support obligation and remand the case for a timely hearing consistent with *Hopkins v. Hopkins* and this opinion. Neither party shall have an obligation to pay child support unless the trial court, following a hearing, determines that child support is warranted. We tax the costs of this appeal in equal proportions to Tonya Smith Davis and her surety and to Mark Dion Davis for which execution, if necessary, may issue.

WILLIAM C. KOCH, JR., P.J., M.S.

APPENDIX D

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

September 7, 2004 Session

MARK DION DAVIS v. TONYA SMITH DAVIS

Appeal from the Chancery Court for Lawrence County No. 10543-01 Stella L. Hargrove, Judge

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No. M2003-02312-CO-R3-CV – Filed October 12, 2004

This appeal concerns a dispute over the custody of a child who is less than three years old. Within four months after the parents' divorce in the Chancery Court for Lawrence County, the father filed a petition to modify the permanent parenting plan because the mother was obstructing and discouraging his visitation with the child. Following a bench trial, the trial court determined that the wife's post-divorce conduct amounted to a material change in circumstances and that the parents should have equal residential time with the child. The trial court also relieved the father of his child support obligation in light of the change in the permanent parenting plan. The mother has appealed both the change in the permanent parenting plan and the termination of her child support. While we affirm the trial court's

decision to award the parents equal residential time, we vacate the decision with regard to child support.

Tenn. R. App. P. 3 Appeal as of Right;
Judgment of the Chancery Court
Affirmed in Part and Vacated in Part

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN and PATRICIA J. COTTRELL, JJ., joined.

Randy Hillhouse, Lawrenceburg, Tennessee, for the appellant, Tonya Smith Davis.

Christopher V. Sockwell, Lawrenceburg, Tennessee, for the appellee, Mark Dion Davis.

OPINION

I.

Mark Davis and Tonya Smith Davis ("Ms. Smith") married on November 11, 2000 and separated four months later. Before their separation, the couple conceived a child, Katie Davis, who was born on December 27, 2001. They were divorced in the Chancery Court for Lawrence County in February 2002. The permanent parenting plan they entered into at that time allowed Ms. Smith to care for Katie at all times except for two hours each Sunday, Tuesday, and Thursday, certain holidays, two weeks during each summer, and at other such times as

both parties agreed. The parenting plan further provided that all major decisions regarding education, non-emergency health care, and religion would be made jointly.

Despite the spirit of cooperation reflected in the permanent parenting plan, Ms. Smith quickly set about obstructing Mr. Davis's efforts to nurture his relationship with Katie. In June 2002, Mr. Davis filed a petition in the Chancery Court for Lawrence County asserting that Ms. Smith had denied him reasonable visitation opportunities and had refused to consult with him when making major decisions concerning Katie. He alleged that Ms. Smith had refused to allow him the two weeks of summer visitation. Mr. Davis also asserted that while Ms. Smith was at work she insisted on placing Katie in daycare even though he was available to care for Katie during the day. In addition, he alleged that Ms. Smith made major decisions without consulting him, including choosing Katie's daycare and physician. Because of Ms. Smith's efforts to exclude him from Katie's life, Mr. Davis requested either to have equal parenting time with Katie or to be designated as the primary residential parent.

Ms. Smith denied Mr. Davis's allegations and filed a counter-petition, which she withdrew at trial, alleging that she had concerns as to Mr. Davis's parenting ability. She sought a home study, counseling, increased child support, and a restraining order against Mr. Davis to prevent him from coming to her work, church, and Katie's doctor's office and daycare.

Ms. Smith accused Mr. Davis of exhibiting strange, disruptive, and harassing behavior around Katie. She also filed a motion to dismiss Mr. Davis's petition to modify the parenting plan.

The trial court declined to dismiss Mr. Davis's petition and conducted a hearing in July 2003. During the hearing, both parties stated that the original parenting plan was not in Katie's best interests. Accordingly, the court awarded equal parenting time to Ms. Smith and Mr. Davis on an alternating four-day schedule and terminated Mr. Davis's child support obligation accordingly. After noting that it was impressed with Mr. Davis's desire to be involved in Katie's life, the court observed that the parties' inability to communicate effectively was not in Katie's best interests and recommended individual and group counseling. On this appeal, Ms. Smith takes issue with the trial court's decisions to modify the permanent parenting plan and to terminate her child support.

II.
THE STANDARD OF REVIEW

Custody and visitation decisions are among the most important decisions that courts make. *Steen v. Steen*, 61 S.W.3d 324, 327 (Tenn. Ct. App. 2001); *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 484 (Tenn. Ct. App. 1997). Their chief purpose is to promote the child's welfare by creating an environment that promotes a nurturing relationship

with both parents. *Aaby v. Strange*, 924 S.W.2d 623, 629 (Tenn. 1996).

Children thrive in stable environments. *Aaby v. Strange*, 924 S.W.2d at 627; National Interdisciplinary Colloquium on Child Custody, *Legal and Mental Health Perspectives on Child Custody Law: A Deskbook for Judges* § 5:1, at 51 (1998) ("*Legal and Mental Health Perspectives on Child Custody Law*"). Accordingly, the courts favor existing custody arrangements. *Taylor v. Taylor*, 849 S.W.2d 319, 332 (Tenn. 1993); *Hoalcraft v. Smithson*, 19 S.W.3d 822, 828 (Tenn. Ct. App. 1999). In fact, a custody decision, once made and implemented, is considered res judicata upon the facts in existence or reasonably foreseeable when the decision was made. *Young v. Smith*, 193 Tenn. 480, 485, 246 S.W.2d 93, 95 (1952); *Steen v. Steen*, 61 S.W.3d at 327; *Solima v. Solima*, 7 S.W.3d 30, 32 (Tenn. Ct. App. 1998).

Despite a preference for continuing existing custody arrangements, the courts have recognized that the circumstances of children and their parents change. Accordingly, our statutes and decisions empower the courts to alter custody arrangements when intervening circumstances require modifications. Tenn. Code Ann. § 36-6-101(a)(1) (Supp. 2003). Thus, courts may modify an existing custody arrangement when required by unanticipated facts or subsequently emerging conditions. *Smith v. Haase*, 521 S.W.2d 49, 50 (Tenn.1975); *Adelsperger v. Adelsperger*, 970 S.W.2d at 485. In the interests of stability in the child's life, a court should not alter an existing custody arrangement until (1) it is

satisfied either that the child's circumstances have changed in a material way since the entry of the presently operative custody decree or that a parent's circumstances have changed in a way that affects the child's well-being, (2) it has carefully compared the current fitness of the parents to be the child's custodian, and (3) it has concluded that changing the existing custody arrangement is in the child's best interests. *Kendrick v. Shoemake*, 90 S.W.3d 566, 570 (Tenn. 2002); *Blair v. Badenhope*, 77 S.W.3d 137, 150 (Tenn. 2002).

There are no bright line rules for determining when a change of circumstances should be deemed material enough to warrant changing an existing custody arrangement. *Kendrick v. Shoemake*, 90 S.W.3d at 570; *Taylor v. Taylor*, 849 S.W.2d at 327; *Solima v. Solima*, 7 S.W.3d at 32. These decisions turn on the unique facts of each case. As a general matter, however, the following principles illuminate the inquiry. First, the change of circumstances must involve either the child's circumstances or a parent's circumstances that affect the child's well-being. *Kendrick v. Shoemake*, 90 S.W.3d at 570. Second, the changed circumstances must have arisen after the entry of the custody order sought to be modified. *Turner v. Turner*, 776 S.W.2d 88, 90 (Tenn. Ct. App. 1989). Third, the changed circumstances must not have been reasonably anticipated when the underlying decree was entered. *Adelsperger v. Adelsperger*, 970 S.W.2d at 485. Fourth, the change in circumstances must affect the child's well-being in some material way. *Kendrick v. Shoemake*, 90

S.W.3d at 570; *Blair v. Badenhope*, 77 S.W.3d at 150; *Hoalcraft v. Smithson*, 19 S.W.3d at 829.

The person seeking to change an existing custody arrangement has the burden of demonstrating both that the child's circumstances have changed materially and that the best interests of the child require a change in the existing custody arrangement. *In re Bridges*, 63 S.W.3d 346, 348 (Tenn. Ct. App. 2001); *Musselman v. Acuff*, 826 S.W.2d 920, 922 (Tenn. Ct. App. 1991). The threshold question is whether there has been a material change in the child's circumstances. *Kendrick v. Shoemake*, 90 S.W.3d at 570; *Blair v. Badenhope*, 77 S.W.3d at 150; *Placencia v. Placencia*, 48 S.W.3d 732, 736 (Tenn. Ct. App. 2000). If the person seeking the change of custody cannot demonstrate that the child's circumstances have changed in some material way, the trial court should not re-examine the comparative fitness of the parents, *Caudill v. Foley*, 21 S.W.3d 203, 213 (Tenn. Ct. App. 1999), or engage in a "best interests of the child" analysis. Rather, in the absence of proof of a material change in the child's circumstances, the trial court should simply decline to change custody. *Hoalcraft v. Smithson*, 19 S.W.3d at 828.

Custody and visitation decisions often hinge on subtle factors, including the parents' demeanor and credibility during the divorce proceedings themselves. *Adelsperger v. Adelsperger*,
970 S.W.2d at 485. Accordingly, trial courts have broad discretion to fashion custody and visitation

arrangements that best suit the unique circumstances of each case. *Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn. 1999); *Suttles v. Suttles*, 748 S.W.2d 427, 429 (Tenn. 1988); *Helson v. Cyrus*, 989 S.W.2d 704, 707 (Tenn. Ct. App. 1998). It is not our role to "tweak [these decisions] . . . in the hopes of achieving a more reasonable result than the trial court." *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001).

However, trial courts must base their custody and visitation decisions on the evidence and on an appropriate application of the relevant legal principles. *D v. K*, 917 S.W.2d 682, 685 (Tenn. Ct. App. 1995). Thus, we review these decisions de novo on the record with a presumption that the trial court's findings of fact are correct unless the evidence preponderates otherwise. *Nichols v. Nichols*, 792 S.W.2d 713, 716 (Tenn. 1990); *Swett v. Swett*, No. M1998-00961-COA-R3-CV, 2002 WL 1389614, at *5 (Tenn. Ct. App. June 27, 2002) (No Tenn. R. App. P. 11 application filed); Tenn. R. App. P. 13(d). A trial court's decision regarding custody or visitation should be set aside only when it "falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record." *Eldridge v. Eldridge*, 42 S.W.3d at 88.

III.

THE MODIFICATION OF THE RESIDENTIAL SCHEDULE

Ms. Smith takes issue with the trial court's decision to modify the residential schedule on two grounds. First, she asserts that no material change of circumstances has occurred that would require a change in the residential schedule. Second, she insists that even if the circumstances had materially changed, giving the parties equal parenting time was not in Katie's best interest. We disagree with both arguments.

A parent's failure to adhere to the requirements of a permanent parenting plan can be considered a material change in circumstances. Tenn. Code Ann. § 36-6-101(a)(2)(B) (Supp. 2003). This record contains abundant evidence that Ms. Smith has refused to adhere to the plain requirements of the parenting plan and that she has purposely and deliberately embarked on a course which, if not stopped, would eventually erode the relationship between Mr. Davis and Katie. Accordingly, we find that the trial court's conclusion that the circumstances had changed materially following the divorce is amply supported by the record.

Ms. Smith also asserts on appeal that Mr. Davis presented no evidence to show that a change in residential schedule would be in Katie's best interests. While both parties agreed at trial that the permanent parenting plan was not working and that it should be modified, Ms. Smith insists that the only change that was warranted was to give Mr. Davis increased visitation time. She argues that the trial court went too far when it decided to grant the parties equal parenting time. Again, we disagree.

The trial court considered such factors as Katie's young age, the stability of her relationship with both parents, and the willingness and ability of both parents to care for and address her needs. The court noted that Katie's relationships with both parents should be fostered unless inconsistent with Katie's best interests. The trial court found no such inconsistency and, in fact, concluded that it had discovered "nothing in the record that indicates the father does not provide nurturing and love" to Katie while she is in his care and control. After careful review of the record, this Court finds no basis upon which to hold that the equal parenting plan is not presently in Katie's best interests.

During oral argument, this court expressed some concern about the long-term viability of the revised residential schedule because the parents are currently living in different cities that are more than one hour's drive apart. Shuttling Katie back and forth every four days will no longer be in her best interests when she begins school. Ms. Smith insists that these potential difficulties provide a sufficient basis to vacate the revised residential schedule and to designate her as the primary residential parent. We respectfully disagree. Courts must base their decisions on the evidence of what has already happened, not on speculation about what might happen in the future. These parents have the power to avoid these potential difficulties by working out a mutually satisfactory parenting arrangement once Katie begins school.

IV.

THE TERMINATION OF MR. DAVIS'S CHILD SUPPORT

Ms. Smith also takes issue with the trial court's decision to relieve Mr. Davis of his child support obligation. She asserts that the trial court erred because Mr. Davis had not requested the court to modify his child support and because the parties did not present evidence regarding the factors relevant to child support modifications. While the trial court's decision to terminate Mr. Davis's child support obligation had a sound legal foundation when it was made, a recent Tennessee Supreme Court decision requires us to remand the case for further proceedings regarding child support. *See Hopkins v. Hopkins*, ___ S.W.3d ___, ___, 2004 WL 2151200 (Tenn. 2004).

When the trial court conducted the July 2003 hearing, the prevailing view was that only a parent who spent a greater amount of time with his or her child was entitled to receive child support. *Gray v. Gray*, 78 S.W.3d 881, 884 (Tenn. 2002). Accordingly, this court had held on at least two prior occasions that neither parent is entitled to child support when (1) neither parent is designated as the primary residential parent and (2) the residential schedule grants the parents equal parenting time. *Cox v. Cox*, No. E2002-020340COA-R3-CV, 2003 WL 1797944, at *4 (Tenn. Ct. App. Mar. 31, 2003) (No Tenn. R. App. P. 11 application filed); *Baily v. Capps*, No. M1999-02300 COA R3 CV, 2001 WL 310643, at *4 (Tenn. Ct. App. Apr. 2, 2001) (No Tenn. R. App. P. 11 application filed). Because the trial court had awarded

Mr. Davis and Ms. Smith precisely equal parenting time, neither one of them was entitled to child support under the law as it stood at that time.

On the same day that this court filed its original opinion in this case, the Tennessee Supreme Court handed down an opinion that changed the law with regard to the effect that an award of equal parenting time has on the parents' child support obligations. The court "decline[d] to adopt a bright-line rule that no child support is owed when a child's residential time is divided equally between the parents." *Hopkins v. Hopkins*, ___ S.W.3d ___, ___, 2004 WL 2151200, at *2 (Tenn. 2004).

This holding undermines the continuing validity of *Cox v. Cox* and *Baily v. Capps* and requires us to withdraw our original opinion.

Hopkins v. Hopkins involves two working parents with significantly different salaries.

Victor Hopkins's annual income was more than twice as much as Synthia Hopkins's income. When they were divorced in July 2002, the trial court determined that their children would reside with Mr. Hopkins for 235 days a year and directed Ms. Hopkins to pay Mr. Hopkins $681 per month in child support. On appeal, Ms. Hopkins asserted that the trial court had awarded Mr. Hopkins too much residential time. This court agreed and determined that the children's best interests would be best served by dividing their physical custody equally between the parents. We also decided that Mr.

Hopkins should pay Ms. Hopkins $800 per month in child support to equalize the resources available to the children. Tenn. Comp. R. & Regs. r. 1240-2-4-.02(2)(e) (2003).

Mr. Hopkins filed a Tenn. R. App. P. 11 application seeking review of this court's decision to require him to pay Ms. Hopkins $800 per month in child support. The Tennessee Supreme Court first concluded that awarding equal parenting time is "permissible."[1] Then, turning to the issue of child support, the court held (1) that determining the amount of child support must be done on a case-by-case basis when the parents have equal parenting time,[2] (2) that reducing child support to zero was permissible, but not necessarily required, when parenting time is divided equally,[3] (3) that only parents designated as the primary residential parent are entitled to receive child support,[4] and (4) that the courts must designate one of the parents as the primary residential parent in every case, even when the parents have been awarded equal parenting time.[5] Applying these principles to the

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[1] Hopkins v. Hopkins , 2004 WL 2151200, at *2.

[2] Hopkins v. Hopkins , 2004 WL 21512000, at *2.

[3] Hopkins v. Hopkins , 2004 WL 21512000, at *2; Gray v. Gray, 78 S.W.3d at 884.

[4] Hopkins v. Hopkins , 2004 WL 21512000, at *3; Gray v. Gray, 78 S.W.3d at 884.

333[5] Hopkins v. Hopkins, 2004 WL 21512000, at *2, 3. A dissenting justice characterized this holding as "contrived." Hopkins v. Hopkins, 2004 WL 21512000, at *4 (Barker, J., dissenting). We confess our inability to understand how a parent who has been awarded 50% of the parenting time can be designated as a primary residential parent in light of Tenn.

facts of the *Hopkins* case, the court overturned our decision to require Mr. Hopkins to pay Ms. Hopkins $800 per month in child support *solely* because we had not designated Ms. Hopkins as the primary residential parent. The court then remanded the case with directions to enter a parenting plan designating a primary residential parent and calculating child support. *Hopkins v. Hopkins*, 2004 WL 2151200, at *3.

Once the Tennessee Supreme Court has addressed an issue, its decision regarding that issue is binding on the lower courts. *State v. Irick*, 906 S.W.2d 440, 443 (Tenn. 1995); *Payne v. Johnson*, 2 Tenn. Cas. (Shannon) 542, 543 (1877). Thus, this court is bound to adhere to the decisions of the Tennessee Supreme Court. *Bing v. Baptist Mem'l Hosp.*, 937 S.W.2d 922, 925 (Tenn. Ct. App. 1996); *Schultz' Estate v. Munford, Inc.*, 650 S.W.2d 37, 39 (Tenn. Ct. App. 1982). The court has even admonished us that we are not free to disregard its dictum when the court is speaking directly on the matter before it and it is seeking to give guidance to the bench and bar. *Holder v. Tennessee Judicial Selection Comm'n*, 937 S.W.2d 877, 881-82 (Tenn. 1996).

Code Ann. § 36-6-402(4) (2001) which defines "primary residential parent" as "the parent with whom the child spends more than fifty percent (50%) of the time." If a child is residing with a parent for 50% of the time, that same child cannot be spending more than 50% of the time with that same parent.

Accordingly, we conclude that the trial court erred first by failing to designate either Mr. Davis or Ms. Smith as the primary residential parent and second by basing its child support decision solely on the fact that the parents had equal residential time. We, therefore, vacate the portion of the trial court's final order regarding child support and remand the case to the trial court with directions to designate a primary residential parent and to address the question of child support as required by the *Hopkins v. Hopkins*.

Accordingly, we conclude that the trial court erred first by failing to designate either Mr. Davis or Ms. Smith as the primary residential parent and second by basing its child support decision solely on the fact that the parents had equal residential time. We, therefore, vacate the portion of the trial court's final order regarding child support and remand the case to the trial court with directions to designate a primary residential parent and to address the question of child support as required by the *Hopkins v. Hopkins*.

V.

We affirm the portion of the judgment granting the parents equal residential time. We vacate the portion of the judgment terminating Mr. Davis's child support obligation and remand the case for a timely hearing consistent with *Hopkins v. Hopkins* and this opinion. Neither party shall have an obligation to pay child support unless the trial court, following a

hearing, determines that child support is warranted. We tax the costs of this appeal in equal proportions to Tonya Smith Davis and her surety and to Mark Dion Davis for which execution, if necessary, may issue.

WILLIAM C. KOCH, JR., P.J., M.S.

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APPENDIX E

IN THE CIRCUIT COURT OF LAUDERDALE COUNTY, ALABAMA

IN RE: THE MARRIAGE OF	^
	^
TONYA BLACKSTOCK,	^
Petitioner,	^
	^
v.	**^CASE NO.:**
MARK DAVIS,	**^DR-**
Respondent.	**^2006-086.01**

^ORDER^

The held a trial in this matter at which the parties were present with their attorneys. After consideration of the evidence, the Court **FINDS** and **ORDERS** as follows:

1. Joint legal custody remains with both parents.

2. Primary physical custody of the child of the parties is placed with her mother being September 1, 2006 subject to the visitation rights of the father. The father is awarded the visitation rights attached hereto as Exhibit "A". Additionally, in view of the father's close relationship with his

child, the Standard Visitation Guidelines are modified so that Paragraph 2 provides that with respect to "weekday visitation", the father shall have every Tuesday from when the child is discharged from school until 8:00 p.m.

3. The father is **ORDERED** to pay child support of $469.00 per month beginning September 15, 2006 and the 15th day of each month thereafter. All child support payments are to be made to the Alabama Child Support Payment Center, P.O. Box 44015, Montgomery, AL 36124-4015, for disbursement to the petitioner.

4. The parties shall remain responsible for one-half (1/2) of the uninsured medical costs of the child. However, the father is due a credit of $1,338.93. Accordingly, a deduction from this credit shall be made for one-half (1/2) of the uninsured medical costs of the child until such time as the credit has been used. The child shall have medical insurance coverage from her mother's husband through his place of employment, if it is available. The mother shall immediately notify the father in writing if such coverage is not available or is cancelled. The child's father is to be given an insurance card, claim forms, or other information necessary to obtain medical care for the child. If the signature of either parent or any assistance of either parent is needed to obtain medical insurance benefits, then the parent shall freely give the same upon request.

If the mother has been required to pay for such care at the time of its delivery, then the father shall reimburse his share to the mother by check, money order, or cash, with a receipt (subject to the credit given above). He shall do so within seven (7) days after the mother has presented him with a copy of the statement, invoice or bill and proof that it has been paid. Otherwise, the father is to pay his share directly to the healthcare provider within seven (7) days of receipt of the bill. The mother shall be fully responsible for any charges made for a failure to keep a scheduled appointment with a healthcare provider.

The mother shall keep the father advised of the child's health and consult with him regarding her needs for medical, dental and optometric care. Elective orthodontic care must be discussed and agreed upon by the mother and father before the father is required to pay a share of such elective care. If no agreement is reached, an order of this Court must be obtained as to the need for and the sharing of such costs.

DONE this 31 day of August, 2006.

/s/ _____ */*

NEDMICHAEL SUTTLE
CIRCUIT COURT JUDGE

cc: **Melinda Austin, Esq.**
Heath Trousdale, Esq.

LAUDERDALE COUNTY STANDARD VISITATION, EFFECTIVE MAY 1, 2003

EXHIBIT "A"

VISITATION FOR A CHILD UNDER 12 MONTHS 0F AGE

The non-custodial parent shall have the right to visit with the minor child under the age of twelve months, each Sunday from 2:00 p.m. to 5:00 p.m. at the place where the child resides, unless the parties mutually agree upon another location.

VISITATION FOR A CHILD OVER 12 MONTHS AND UNDER 3 YEARS

The non-custodial parent shall have scheduled visitation on the first and third Saturday each month from 9:00 a.m. to 6:00 p.m.;

On the second and fourth Sunday from noon to 5:00 p,m,;

On the birthdays of the child and the non-custodial parent from 5:00 p.m. to 8:00 p.m.;

FILED IN OFFICE
SEPT 01 2006
/s/ Kenneth C. Austin

Easter Day from 3:00 p.m. to 8:00 p.m.

4th of July from 3:00 p.m. to 8:00 p.m.
Thanksgiving Day from 3:00 p.m. to 8:00 p.m.;

Christmas Day from 3:00 p.m. to 8:00 p.m.;

Father's Day/Mother's Day from noon to 5:00 pm.

VISITATION FOR CHILDREN 3 YEARS OLD OR OLDER

1. **WEEKENDS.** Every other weekend from Friday at 6:00 p.m. until Sunday at 6:00 p.m. The first weekend visitation shall begin the second full weekend after the date of the decree.

2. **WEEK DAY VISITATION.** Every other Tuesday from 4:00 p.m. to 8:00 p.m. beginning the first Tuesday after the date of the decree.

3. **SUMMER VISITATION**

(a) Each June from the first Friday in June at 6:00 p.m. until the third Friday in June at 6:00 pan, During this 14-day period, the custodial parent shall not have visitation with the child(ren), but shall have reasonable telephone contact. The non-custodial parent shall have no other visitation with the child(ren) during this 14-day period.

(b) Each July from the second Friday in July at 6;00 p.m. until the fourth Friday in July at 6:00 p.m. During this 14-day period, the custodial parent shall not have visitation with the child(ren), but shall have reasonable telephone contact. The non-custodial parent shall have no other visitation with the child(ren) during this 14-day period.

4. SPRING BREAK. Monday through Wednesday at 6:00 p.m. if the non-custodial parent has regularly scheduled weekend visitation prior to spring break; Wednesday at 6:00 p.m. through Friday if regularly scheduled weekend visitation begins on the weekend following spring break.

5. **FALL BREAK.** Monday through Wednesday at 6:00 p.m. if the non-custodial parent has regularly scheduled visitation prior to fall break week. Wednesday at 6:00 p.m. through Friday if regularly scheduled weekend visitation begins on the weekend following fall break week.

6. CHILD'S BIRTHDAY. From 4:00 p.m. to 7:00 p.m. If there is more than one child, the non-custodial parent is entitled to visit with all children on each child's birthday.

7. BIRTHDAY OF EITHER PARENT. Each parent shall have visitation on his or her birthday visitation from 4:00 p.m. to 7:00 p.m.

8. HOLIDAY VISITATION FOR NON-CUSTODIAL PARENT.

(A) In odd numbered years:

1. Easter Sunday from 8:00 a.m. until 6:00 p.m.
2. Labor Day from 8:00 a.m. until 6:00 p.m.
3. Thanksgiving weekend, from the Wednesday before Thanksgiving Day at 6:00 p.m. until Friday at 6:00 p.m. If this is the non-custodial parent's regularly scheduled weekend visitation, then the visitation will end on Sunday at 6:00 p.m.

(B) In even numbered years:

1. Memorial Day from 8:00 a,m. until 6:00 p.m.
2. July 4th from 8:00 a.m. until July 5th at 8:00 a.m.

9. CHRISTMAS VACATION.

(a) In even numbered years from the day and time school is recessed for Christmas holidays until December 25 at 2:00 p.m.

(b) In odd numbered years from December 25 at 2:00 p.m. until January 2 at 6:00 p.m.

10. **FATHER'S DAY/MOTHER'S DAY.** The child(ren) shall be with the his/her/their father on Father's Day each year from 9:00 a.m. until 6:00 p.m. The children) shall be with the his/her/their mother on Mother's Day each year from 9:00 a.m. until 6:00 p.m.

11. **OTHER REASONABLE TIMES AND PLACES.** At all other times and places as may be agreed upon between the parties.

12. **NOTICE.** No advance notice shall be required of the non-custodial parent concerning visitation. However, the non-custodial parent shall notify the custodial parent, as soon as practicable, if said non-custodial parent is unable to visit with the child(ren) during the scheduled time and place.

13. **TELEPHONE ACCESS.** Each parent shall have reasonable telephone access to the minor child(ren) while in the physical custody of the other parent between 7:00 a.m. and 8:00 p.m. The child(ren) shall also have reasonable telephone access to both parents at all reasonable times.

14. **SPECIAL EVENTS.** Children are entitled to have both parents present at special events, such as graduation, special school events, sporting and extra-curricular events, and any other special occasions which would be of significance to the child(ren). The custodial parent shall notify the non-custodial of such events in advance. Both parents are directed to cooperate with each other so that these events will remain special events in the lives of their child(ren).

15. **EVENTS SCHEDULED DURING VISITATION.** The custodial parent shall inform the non-custodial parent of any regularly scheduled sporting events, practices, school activities, or other

functions which the child(ren) would normally attend during any scheduled visitation period. The non-custodial parent shall make reasonable efforts to allow the child(ren) to attend such functions during any period of visitation.

16. **ILLNESS.** Both parents are directed to immediately notify the other parent in the event any regularly scheduled visitation cannot occur as scheduled. Normal childhood illnesses will normally not be deemed a sufficient reason for canceling a scheduled visitation; however, the custodial parent shall convey full instructions to the non-custodial parent concerning medication, treatment, and physicians' orders. If the child(ren) is treated during a visitation with the non-custodial parent, then the custodial parent shall be fully informed of the treatment, medication and doctor's advice concerning the child(ren).

17. **TRANSPORTATION.** The non-custodial parent is responsible for picking the child(ren) up at the residence of the custodial parent and returning the child(ren) to the same residence as long as the most direct route from the non-custodial parent's residence to the child(reas residence is 20 miles or less. If the distance is greater than 20 miles, then the non-custodial parent shall be responsible for getting the child(ren) at their residence at the beginning of the visit and the custodial parent shall be responsible for getting the child(ren) at the residence of the non-custodial parent at the end of the visit.

18. **CONDUCT.** Each parent shall encourage a smooth and orderly transition of the child(ren) at the beginning and conclusion of each visit and shall in no way attempt to influence, alienate or otherwise sway the child(ren) against the other parent. Parents shall not make derogatory or insulting remarks or comments regarding the other in the presence of the child(ren). Parents shall not involve the child(ren) in any disputes about child support and visitation.

APPENDIX F

REL: 06/29/07

Notice: This opinion is subject to formal revision before publication in the advance sheets of **Southern Reporter**. Readers are requested to notify the Reporter of Decisions, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229- 0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in **Southern Reporter**.

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2006-2007

2060017

Mark Davis

v.

Tonya Blackstock

Appeal from Lauderdale Circuit Court
(DR-06-86.01)

MOORE, Judge.

Mark Davis ("the father") appeals from a judgment of the Lauderdale Circuit Court awarding Tonya Blackstock ("the mother") primary custody of the parties' child and modifying the father's child-support obligation. We reverse and remand.

Facts and Procedural History

The father and the mother married on November 11, 2000. Four months later, while they were residing in Tennessee, the father and the mother separated. The mother was pregnant with the child at the time of the separation. Subsequently, a petition for divorce was filed in the Chancery Court for Lawrence County, Tennessee ("the Tennessee trial court"). Before the Tennessee trial court ruled on the divorce petition filed with that court, the father and the mother moved to Alabama, where the mother gave birth to the child on December 27, 2001.

On February 15, 2002, the Tennessee trial court entered a judgment divorcing the father and the mother. In essence, the Tennessee judgment granted the father and the mother joint custody, with the mother receiving primary physical custody and child support. In June 2002, while the father, the mother, and the child continued to reside in Alabama, the father petitioned the Tennessee trial court for a modification of its February 15, 2002, judgment with regard to custody. On September 3, 2003, the

Tennessee trial court modified its divorce judgment by granting the father equal physical custody on a four-day rotating basis and terminating the father's child support obligation.

The mother appealed the September 3, 2003, judgment to the Tennessee Court of Appeals. On October 12, 2004, the Tennessee Court of Appeals issued an opinion and an order affirming that portion of the September 3, 2003, judgment that modified custody and vacating that portion of the judgment that modified the father's child-support obligation. The Tennessee Court of Appeals remanded the case for a hearing to determine which parent should be the "primary residential parent" and whether child support should be awarded. See Davis v. Davis, (No. M2003-02312-COA-R3-CV) (Tenn. Ct. App. 2004) (not reported in S.W.3d). The Tennessee trial court never acted on this mandate.

On February 6, 2006, the mother filed a petition for modification of custody and child support in the Lauderdale Circuit Court ("the Alabama trial court"). In response, on February 23, 2006, the father filed a petition for a custody hearing in the Tennessee trial court. Both parties filed motions to dismiss the other's petition on the ground of lack of subject-matter jurisdiction. The mother argued that the Tennessee trial court no longer had jurisdiction over the custody issue because the father, the mother, and the child had resided in Alabama for the preceding four years. The father argued that the Alabama trial court could not exercise jurisdiction

because the Tennessee court was continuing to exercise its jurisdiction. The Alabama trial court granted the father's motion to dismiss, but it set aside its dismissal order after the mother alleged that the Tennessee trial court had yielded jurisdiction to Alabama as a more convenient forum and had dismissed the father's custody-hearing petition.[9]

The parties proceeded to a custody hearing in the Alabama trial court. At the hearing, the father requested that the mother be held in contempt for failing to abide by the Tennessee trial court's September 3, 2003, judgment; he also requested that he be awarded primary physical custody of the child. The mother denied that she was in contempt and requested that she be awarded primary physical custody of the child. Following ore tenus proceedings, the Alabama trial court entered a judgment on September 1, 2006. The Alabama trial court's judgment maintained joint legal custody, but it awarded the mother primary physical custody of the child and awarded the father visitation. The Alabama trial court further ordered the father to pay child support and to pay one-half of the uninsured-medical expenses of the child. The judgment also

[9] The alleged order of the Tennessee trial court dismissing the father's petition and yielding jurisdiction to the Alabama trial court was not reduced to writing at the time the father brought this appeal. Hence, the record does not contain the alleged order, and we cannot consider this allegation as proven for purposes of this appeal.

provided the father a credit of $1,338.93 to be applied to his share of the child's uninsured-medical expenses.

Discussion

A. Whether the Alabama Trial Court Had Subject-Matter Jurisdiction Over the Custody Issue

The father first argues that the Alabama trial court did not have jurisdiction to modify the custody order entered on September 3, 2003, by the Tennessee trial court. The father bases his argument on two different grounds: 1) that the Tennessee trial court still had jurisdiction over the custody dispute because it had not yet acted on the mandate from the Tennessee Court of Appeals and 2) that under Tennessee's version of the Uniform Child Custody Jurisdiction and Enforcement Act ("the Tennessee UCCJEA"), the Tennessee trial court had continuing exclusive jurisdiction over the custody issue.

As to the first argument, the father is correct that the Tennessee trial court had not yet acted on the mandate of the Tennessee Court of Appeals; however, the father fails to recognize that the mandate did not concern the custody dispute. The Tennessee Court of Appeals affirmed the modification of the custody arrangement and remanded the case solely for the purpose of having the Tennessee trial court determine which parent should be designated the primary residential parent

for the purpose of determining child support.[2] Thus, the issue of custody had been finally determined and was not before the Tennessee trial court on remand.

At the time the mother filed her custody-modification petition in the Alabama trial court, there was no simultaneous custody proceeding pending in the Tennessee trial court that could have had any effect on the subject-matter jurisdiction of the Alabama trial court. See Ala. Code 1975, § 30-3B-206.

Hence, and considering further the father's failure to cite any legal authority to support this position, see Rule 28(a)(10), Ala. R. App. P., we reject the father's argument that the Alabama trial court did not have subject-matter jurisdiction because the Tennessee trial court had yet to act on the mandate of the Tennessee Court of Appeals.

The father next asserts that the Tennessee trial court had exclusive, continuing jurisdiction over the custody issue pursuant to Tenn. Code Ann. § 36-6-217, a part of the Tennessee UCCJEA.[3] That statute provides, in pertinent part:

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[2] The father does not argue that the Alabama trial court lacked subject-matter jurisdiction to modify his child support obligation; hence, we will not address that point.

[3] Section 30-3B-202, Ala. Code 1975, the corresponding section of Alabama's UCCJEA, provides, in pertinent part:

"(a) ... [A] court of this state which has made a child custody determination consistent with Section 30-3B-201 or Section 30-3B-203 has continuing, exclusive jurisdiction over the determination until:

> "(1) A court of this state determines that neither the child, nor the child and one parent, care, protection, training, and personal relationships; or
>
> "(2) A court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state."

"(a) ... [A] court of this state which has made a child custody determination consistent with this part has exclusive, continuing jurisdiction over the determination until:

> "(1) A court of this state determines that neither the child, nor the child and one (1) parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or
>
> "(2) A court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state."

The father argues that because the Tennessee trial court did not make a determination under subsection (a)(1), it retained exclusive, continuing jurisdiction over the matter. However, the father overlooks the fact that the Tennessee statute (and the corresponding Alabama statute) provide alternative bases for terminating a court's exclusive, continuing jurisdiction. Under subsection (a)(2), the Tennessee trial court loses continuing, exclusive jurisdiction once a court of another state determines that the child, the child's parents, and any person acting as a parent no longer "presently" reside in Tennessee. The father concedes that all relevant parties resided in Alabama at the time the mother filed her petition in the Alabama trial court. See Peterson v. Peterson, [Ms. 2050491, Feb. 9, 2007] ___ So. 2d ___, ___ (Ala. Civ. App. 2007) ("Continuing, exclusive jurisdiction under § 30-3B-202(a) is determined on the basis of the circumstances existing on the date a petition seeking a modification of a[] ... prior custody determination is filed."); see also § 30-3B-202, Ala. Code 1975, Official Comment ("Jurisdiction attaches at the commencement of a proceeding.").

Although the Alabama trial court did not make an express finding that the father, the mother, and the child all resided in Alabama, it denied the father's motion to dismiss for lack of subject-matter jurisdiction based, in part, on the mother's factual assertion that all relevant parties had resided in Alabama since 2001. Hence, the Alabama trial court at least impliedly determined that none of the relevant parties resided in Tennessee. That finding

is supported by substantial evidence contained in the record. Consequently, the Tennessee trial court no longer retained exclusive, continuing jurisdiction over the custody issue at the time the mother filed her custody-modification petition in the Alabama trial court.

Having rejected both of the father's arguments, we find that the Alabama trial court did not err by exercising jurisdiction over the mother's petition to modify custody.

B. Whether There Was a Material Change Affecting the Child's Welfare

"In cases in which a parent seeks a modification of a joint-custody arrangement, the parent must prove '"a material change of circumstances of the parties since the prior [judgment] which change of circumstances is such as to affect the welfare and best interest of the child or children involved."'" Morgan v. Morgan, [Ms. 2050348, March 16, 2007] ___ So. 2d ___, ___ (Ala. Civ. App. 2007) (quoting Watters v. Watters, 918 So. 2d 913, 916 (Ala. Civ. App. 2005), quoting in turn Ponder v. Ponder, 50 Ala. App. 27, 30, 276 So. 2d 613, 615 (Ala. Civ. App. 1973)).

The evidence showed that at the time the 2003 custody judgment was entered, when the child was not yet two years old, the father resided in Decatur, Alabama, and the mother resided in Florence, Alabama. The child attended day care in Florence at

First Day Childcare & Development Center ("First Day"). The father had testified in the 2003 hearing that he planned to move to Florence when the child got older.

Since the entry of the 2003 judgment, the father has remained a resident of Decatur, although he testified that he still plans to move to Florence before the child starts kindergarten. The mother and the father have alternated physical custody of the child every four days. The child cried at some early custody exchanges, but she has not regularly cried during exchanges since August 2004. The father arranged with the First Day staff to send him the child's materials so that he could work with her on her projects, such as coloring, on the days she could not attend day care while in his custody.

The child participated in gymnastics in Decatur and attended church in both Decatur and Florence depending on which parent had custody. However, due to the custody arrangement, the child could not participate in tee ball and cheerleading. The child had also missed some day-care ceremonies, field trips, birthday parties, and church activities while in the father's custody. The child complained to her mother about missing those events and the constant change of environment. Nevertheless, the child thrived in this arrangement. Witnesses testified that the child is a loving, caring, and smart child who is very progressed for her age. Both parties also agree that the other party enjoys a loving relationship with the child.

The child was to commence pre-kindergarten school in the fall of 2006. The mother originally planned for the child to attend a different school, but ultimately she decided that the child would remain at First Day. Although the pre-kindergarten program is more structured than the day-care program the child had previously attended, the teacher who would be teaching the child's class testified that there is a part-time program and that sometimes they are flexible with the days of attendance. The teacher further testified that she would not have a problem sending the father the child's workbooks for him and the child to work on when she is in his custody.

Based on the totality of the evidence, we conclude that the mother failed to meet her burden of showing that a material change of circumstances had occurred that affected the child's welfare since the last custody order. See, e.g., Watters v. Watters, 918 So. 2d 913, 916-17 (Ala. Civ. App. 2005). The evidence shows that the only change that has occurred has been the natural progression of the child to pre-kindergarten school. However, the mother has not demonstrated how this change, in the context of the joint-custody arrangement, has affected the child's welfare or best interest. The evidence shows that the child could attend pre-kindergarten part-time and that the father could instruct the child on the days she did not attend. The child thrived in a similar arrangement in day care. The mother presented no evidence to indicate that the child would not continue to thrive while in pre-kindergarten under the same arrangement. The only

other relevant evidence the mother presented showed that the child expressed anxiety at exchanges and that she would miss school, church, and extracurricular activities if the current custody arrangement was maintained. However, as the father points out, even under the physical-custody arrangement approved by the Alabama trial court, the child would still experience exchanges and would still miss activities.

Accordingly, we reverse the Alabama trial court's modification of the 2003 custody judgment.

C. Child Support

Our reversal of the trial court's judgment with regard to custody will necessarily impact the child-support award. Therefore, we remand this case for the Alabama trial court to reconsider its child-support award in light of this opinion.

REVERSED AND REMANDED.

Thompson, P.J., and Pittman and Thomas, JJ., concur.

Bryan, J., concurs in the result, without writing.

APPENDIX G

REL: 09/11/2009

Notice: This opinion is subject to formal revision before Publication in the advance sheets of **Southern Reporter.** Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed **Southern Reporter.**

SUPREME COURT OF ALABAMA
SPECIAL TERM, 2009

1061445

Ex parte Tonya Blackstock

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS

(In re: Mark Davis

v.

Tonya Blackstock)

(Lauderdale Circuit Court, DR-06-86.01;

Court of Civil Appeals, 2060017)

PER CURIAM.

This case involves a dispute between Tonya Blackstock ("the mother") and Mark Davis ("the father") concerning the custody of their daughter ("the child").

A. Procedural History

The Court of Civil Appeals in Davis v. Blackstock, [Ms. 2060017, June 29, 2007] ___ So. 3d ___, ___ (Ala. Civ. App. 2007), summarized the history of this case:

> "The father and the mother married on November 11, 2000. Four months later, while they were residing in Tennessee, the father and the mother separated. The mother was pregnant with the child at the time of the separation. Subsequently, a petition for divorce was filed in the Chancery Court for Lawrence County, Tennessee ('the Tennessee trial court'). Before the Tennessee trial court ruled on the divorce petition filed with that court, the father and the mother moved to Alabama, where the mother gave birth to the child on December 27, 2001.
>
> "On February 15, 2002, the Tennessee trial court entered a judgment divorcing the father

> and the mother. In essence, the Tennessee judgment granted the father and the mother joint custody, with the mother receiving primary physical custody and child support. In June 2002, while the father, the mother, and the child continued to reside in Alabama, the father petitioned the Tennessee trial court for a modification of its February 15, 2002, judgment with regard to custody. On September 3, 2003, the Tennessee trial court modified its divorce judgment by granting the father equal physical custody on a four-day rotating basis and terminating the father's child support obligation." ___ So. 3d at ___. The mother appealed, and the Tennessee Court of Appeals affirmed the custody-modification order but remanded the cause for further proceedings relating to ancillary matters. Id. When the parties moved to Alabama, the mother moved to Florence and the father moved to Decatur.

In February 2006, the mother filed a petition in the Lauderdale Circuit Court seeking a modification of custody and child support.[1][2] Reiterating statements from her sworn answers to interrogatories, the mother testified at trial as to

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[1] The Court of Civil Appeals concluded that the Lauderdale Circuit Court's assumption of jurisdiction was consistent with the provisions of the Uniform Child Custody Jurisdiction and Enforcement Act, Ala. Code 1975, § 30-3B-101 et seq. This conclusion appears to be correct.

several allegedly material changes in circumstances that, she claimed, warranted a change in the September 2003 custody award, including that the child would begin attending pre-kindergarten classes ("the pre-K program") in the fall of 2006; that the pre-K program was a "structured" program and the child would be required to attend every day; [132] that the child would need daily "structure and stability" at that time; that the four-day rotating-custody arrangement ("the four/four custody arrangement") "minimize[d] stability" for the child and would make it more difficult to stay on a routine with regard to the pre-K program; that as "[the child's] gotten older, she's shown increased anxiety over the constant change of environment, and has voiced dissatisfaction with the constant change"; and that the father "told the Tennessee court he would move to Florence when [the child] got older" and he has not done so.

The father opposed the mother's modification petition, and, a few days before trial, he filed a counterpetition seeking "primary physical custody" of the child on the grounds that the mother had attempted to alienate the child from the father and that she had

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[2] At trial, the mother clarified that the child would have been required to attend every day in the pre-K program in which the mother had initially considered enrolling the child. By the time of trial, however, the parties had agreed for the child to attend a pre-K program that did not require daily attendance as a condition to enrollment.

> "involve[d] the four (4) year old child in adult matters as well as proceeding to enroll the child in an educational type program without consulting and receiving permission from the [father] and knowing that in the current custodial arrangement, the child cannot participate. These are all issues that have developed since the filing of this action, although others exist to support the change of custody."

After an *ore tenus* hearing, the Lauderdale Circuit Court entered a judgment in September 2006 that (1) maintained the joint-legal-custody award to the parents, (2) awarded the mother primary physical custody, (3) awarded the father "standard visitation,"[4] with the addition of visitation "every Tuesday from when the child is discharged from school until 8:00 p.m.," and (4) ordered the father to pay child support. The father appealed.

In reversing the judgment of the Lauderdale Circuit Court, the Court of Civil Appeals stated:

> "Based on the totality of the evidence, we conclude that the mother failed to meet her burden of showing that a material change of circumstances had occurred that affected the

[4] The circuit court's "standard visitation" included visitation every other weekend, four weeks during the summer (two weeks in June and two weeks in July), several days during spring break and fall break from school, and various holidays, and other visitation to which the parties might agree.

child's welfare since the last custody order. See, e.g., Watters v. Watters, 918 So. 2d 913, 916-17 (Ala. Civ. App. 2005) . The evidence shows that the only change that has occurred has been the natural progression of the child to prekindergarten school. However, the mother has not demonstrated how this change, in the context of the joint-custody arrangement, has affected the child's welfare or best interest. The evidence shows that the child could attend prekindergarten part-time and that the father could instruct the child on the days she did not attend. The child thrived in a similar arrangement in day care. The mother presented no evidence to indicate that the child would not continue to thrive while in pre-kindergarten under the same arrangement. The only other relevant evidence the mother presented showed that the child expressed anxiety at exchanges and that she would miss school, church, and extracurricular activities if the current custody arrangement was maintained. However, as the father points out, even under the physical-custody arrangement approved by the Alabama trial court, the child would still experience exchanges and would still miss activities.

"Accordingly, we reverse the Alabama trial court's modification of the 2003 custody judgment."

___ So. 3d at ___.

In her petition to this Court for a writ of certiorari, the mother contends, in part, that the Court of Civil Appeals' decision conflicts with prior precedent. Specifically, she argues (1) that the Court of Civil Appeals' decision conflicts with Lamb v. Lamb, 939 So. 2d 918 (Ala. Civ. App. 2006), because, she says, the Court of Civil Appeals improperly reweighed the evidence and did not give effect to the presumption of correctness afforded the trial court's judgment in ore tenus cases and (2) that the decision conflicts with, or misapplies, the holding in Watters v. Watters, 918 So. 2d 913 (Ala. Civ. App. 2005), on which the Court of Civil Appeals relied. We agree.

B. Standard of Review

Where, as in the present case, there is a prior judgment awarding joint physical custody, "'the best interests of the child'" standard applies in any subsequent custody-modification proceeding. Ex parte Johnson, 673 So. 2d 410, 413 (Ala. 1994) (quoting Ex parte Couch, 521 So. 2d 987, 989 (Ala. 1988)). To justify a modification of a preexisting judgment awarding custody, the petitioner must demonstrate that there has been a material change of circumstances since that judgment was entered and that "'it [is] in the [child's] best interests that the [judgment] be modified'" in the manner requested. Nave v. Nave, 942 So. 2d 372, 376 (Ala. Civ. App. 2005) (quoting Means v. Means, 512 So. 2d 1386, 1388 (Ala. Civ. App. 1987)).

Also, we note the presumption of correctness accorded to a trial court's judgment:

> "When this Court reviews a trial court's child-custody determination that was based upon evidence presented ore tenus, we presume the trial court's decision is correct: '"A custody determination of the trial court entered upon oral testimony is accorded a presumption of correctness on appeal, and we will not reverse unless the evidence so fails to support the determination that it is plainly and palpably wrong...."' Ex parte Perkins, 646 So. 2d 46, 47 (Ala. 1994), quoting Phillips v. Phillips, 622 So. 2d 410, 412 (Ala. Civ. App. 1993) (citations omitted). This presumption is based on the trial court's unique position to directly observe the witnesses and to assess their demeanor and credibility. This opportunity to observe witnesses is especially important in child-custody cases. 'In child custody cases especially, the perception of an attentive trial judge is of great importance.' Williams v. Williams, 402 So. 2d 1029, 1032 (Ala. Civ. App. 1981)."

Ex parte Fann, 810 So. 2d 631, 633 (Ala. 2001).

As this Court stated in Ex parte Bryowsky, 676 So. 2d 1322 (Ala. 1996), quoted in part in Lamb, in an ore tenus proceeding,

"[t]he trial court is in the best position to make a custody determination -- it hears the evidence and observes the witnesses. Appellate courts do not sit in judgment of disputed evidence that was presented ore tenus before the trial court in a custody hearing. See Ex parte Perkins, 646 So. 2d 46, 47 (Ala. 1994), wherein this Court, quoting Phillips v. Phillips, 622 So. 2d 410, 412 (Ala. Civ. App. 1993), set out the well-established rule:

> "'"Our standard of review is very limited in cases where the evidence is presented ore tenus. A custody determination of the trial court entered upon oral testimony is accorded a presumption of correctness on appeal, . . . and we will not reverse unless the evidence so fails to support the determination that it is plainly and palpably wrong, or unless an abuse of the trial court's discretion is shown. To substitute our judgment for that of the trial court would be to reweigh the evidence. This Alabama law does not allow...."'"

676 So. 2d at 1324; see Lamb, 939 So. 2d at 922; see also Ex parte Foley, 864 So. 2d 1094, 1099 (Ala. 2003) ("[A]n appellate court may not substitute its judgment for that of the trial court. To do so would be to reweigh the evidence, which Alabama law does not allow." (citation omitted)).

"'[T]he trial court is in the better position to consider all of the evidence, as well as the many inferences that may be drawn from that evidence,

and to decide the issue of custody.'" Ex parte Patronas, 693 So. 2d 473, 475 (Ala. 1997) (quoting Ex parte Bryowsky, 676 So. 2d at 1326). "Thus, appellate review of a judgment modifying custody when the evidence was presented ore tenus is limited to determining whether there was sufficient evidence to support the trial court's judgment." Cheek v. Dyess, 1 So. 3d 1025, 1029 (Ala. Civ. App. 2007) (citing Ex parte Patronas)(emphasis added) Under the ore tenus rule, where the conclusion of the trial court is so opposed to the weight of the evidence that the variable factors of a witness's demeanor and credibility and the inferences that can be drawn from the evidence, even after considering those factors, "`"could not reasonably substantiate it, then the conclusion is clearly erroneous and must be reversed."'" Cheek, 1 So. 3d at 1029 (quoting B.J.N. v. P.D., 742 So. 2d 1270, 1274 (Ala. Civ. App. 1999), quoting in turn Jacoby v. Bell, 370 So. 2d 278, 280 (Ala. 1979) (emphasis added)).

Further, where, as in the present case, the trial court does not make detailed written findings of fact, we "'will assume that the trial court made those findings [of fact] necessary to support its judgment, unless such findings would be clearly erroneous.'" Ex parte Fann, 810 So. 2d at 636 (quoting Lemon v. Golf Terrace Owners Ass'n, 611 So. 2d 263, 265 (Ala. 1992)).

C. Analysis

1. Deference to the Lauderdale Circuit Court's Findings

The holding of the Court of Civil Appeals is phrased in terms of that court's conclusion as to whether the mother met her burden of proof: "Based on the totality of the evidence, we conclude that the mother failed to meet her burden [of proof]." ___ So. 3d at ___. As noted, however, the question is whether the circuit court heard and saw sufficient evidence that, based on that evidence and the inferences the circuit court reasonably could have drawn from it, the circuit court reasonably could have made the factual findings and reached the conclusion that it reached. After careful review, we conclude that the Court of Civil Appeals failed to give appropriate deference to the circuit court's implicit findings and resulting judgment.

Upon the mother's appeal from the September 2003 order of the Tennessee Chancery Court, the Tennessee Court of Appeals issued an unpublished opinion, Davis v. Davis, (No. M2003-02312-COA-R3-CV) (Tenn. Ct. App. 2004), a copy of which was introduced into evidence at trial in the present case.[154] In that opinion, the Tennessee Court of Appeals stated the following concern about the four/four custody arrangement:

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[4] The mother remarried at some time after the custody proceedings in Tennessee. She did not suggest at trial in the present case, however, that her remarriage was one of the material changes of circumstance that might support a change of custody.

> "During oral argument, this court expressed some concern about the long-term viability of the revised residential schedule because the parents are currently living in different cities that are more than one hour's drive apart. Shuttling [the child] back and forth every four days will no longer be in her best interests when she begins school. [The mother] insists that these potential difficulties provide a sufficient basis to vacate the revised residential schedule and to designate her as the primary residential parent. We respectfully disagree. Courts must base their decisions on the evidence of what has already happened, not on speculation about what might happen in the future. These parents have the power to avoid these potential difficulties by working out a mutually satisfactory parenting arrangement once [the child] begins school."

(Emphasis added.) Also, it is undisputed that the father represented to the courts in Tennessee that he would move to Florence when the child began school, if not sooner.

After the four/four custody arrangement was established, the mother enrolled the child in a weekday day-care program at First Assembly Childcare and Development Center in Florence. Thereafter, the father exercised his custody rights so that the child was not in day care on the weekdays he had custody, though he did have to leave the child

with relatives on occasion because of his work schedule; the father was self-employed as a photographer and also taught occasionally as an adjunct faculty member at a local college.

In the spring of 2006, the mother determined that she would like to enroll the child in a pre-K program in the fall of 2006 in order to prepare her for kindergarten. Although the parties had disputes concerning whether the father was properly involved in the initial decision to enroll the child in a pre-K program and as to which pre-K program should be used, they eventually agreed to enroll the child in the pre-K program at First Assembly.[16] We note that at trial the father did not dispute that enrollment in the pre-K program at First Assembly was in the child's best interest. Instead, he argued that he could adequately compensate for the time the child would miss from the pre-K program when she was in his custody, as he had when she was in the day-care program. In that regard, much of the testimony at trial concerned the nature of the pre-K program and the impact the four/four custody arrangement would have on the benefits the child

[5] The parties apparently had considerable difficulty cooperating, each blaming the other for those problems. The circuit court obviously may have resolved that issue in favor of the mother. In any event, one of the factors relevant to a joint-custody award is "[t]he past and present ability of the parents to cooperate with each other and make decisions jointly." Ala. Code 1975, § 30-3-152. Where such cooperation is lacking and the child's welfare is implicated, a joint — custody award may not be, or may no longer be, appropriate.

might obtain from the program. See discussion infra. There was also testimony, however, concerning some of the negative impacts the four/four custody arrangement, in and of itself, was having on the child.[10] For example, both the mother and the maternal grandmother testified that the child suffered anxiety at the custody exchanges with the father and that her anxiety had grown worse as she got older. In part, the mother testified:

> "Q. What other, if any, changes have you seen in [the child]? And we are talking about leading up to your filing this, that made you realize there had been changes, that this plan needed to be revisited, in her demeanor, her actions, any, did you see any indications about how this was affecting her life or impacting her?
>
> "A. On the fourth day, [the child], she's like a totally different kid. She asked me why, and blamed me for having to carry her, I mean like I don't want her. I'm afraid that she's going to, I mean, she asked me why I'm sending her to

[10] The father argued to the Court of Civil Appeals that the circuit court erred as to the admissibility of certain testimony from Robert D. Young and Myra Carter, see discussion infra, and to the admission of office notes from a counselor who had counseled the parties pursuant to an order of the Tennessee Chancery Court. We have carefully reviewed the record, including the father's objections where an objection was actually made, and we cannot conclude that the circuit court improperly considered any of the evidence that was presented at trial.

daddy's, do I not want her to stay there? She procrastinates when she gets home. My mom picks her up sometimes from day care and has her fed before we go back. And she runs from room to room, just wanting me to play with her, color. She says, 'Carry me back tomorrow night. Daddy won't care,' anything just to prolong us getting there. Then at the exchanges, she cries and holds on to me. And not this past exchange but the one before that, we had gone in the store. She just balked on us, and she didn't want to go. And I went around to the back to talk to her. Mark went around to the back to talk to her. Mark was even telling her, you know, they would go swimming, they would, you know, he would get her this and that. And then finally, she said, 'Well, I gotta go to the bathroom.' So we went in the bathroom. I pulled up to the store where we meet. Everything was okay. Mark bought her some candy. We walked out. And I thought, okay, everything is going to be okay. So then Mark gets her hand, you know, they were walking. And I'm starting to back up. And I look in my rearview mirror, and [the child's] running back to the car, screaming and crying. So Mark runs after [the child], picks her up. And then I'm driving by, with her hands out like this for me to get her.

"Q. And these problems have been going on for several months leading up to you filing the petition. But they are getting even worse?

"A. Right."

Furthermore, in regard to the pre-K program, Brenda Coleman, a teacher in the program at First Assembly, testified that the pre-K program involved a "more structured teaching" than the day-care program and that it was designed to prepare children for the kindergarten program in the school system. The pre-K program operated in a classroom setting with a curriculum to follow. Coleman testified:

> "Q. And please just summarize the curriculum that you follow and how it's structured or what's provided.
>
> "A. Okay. We teach the [A] BEKA Bible curriculum from Pensacola Bible College. It has the alphabet, the numbers, the readiness skills, crafts and things that they need, to use the fine motor skills, and to learn the things they need to get ready for kindergarten. And we have, in my classroom, we have five books that we teach from. And each emphasizes different things. We have a Bible story book also we do stress the importance of.
>
> "Q. And the curriculum that's set out here on Defendant's Exhibit 3, it has what we have been calling loosely instructional time where you are talking about work books?
>
> "A. Mm-hmm.

"Q. Are there other times of the day that you feel the children are learning?

"A. I feel the children are learning all day, because everything we do is geared toward teaching them to follow directions and getting along with other children, and skills like that. And we have the sitdown classroom time, which is this part, part of this that you see is workbook time. That's the sit down. But as you know, children learn all different ways than just to sit down. Writing time with their books is not the only time of the day that we are learning.

"Q. So not trying to, if I understand you correctly, are you saying that all day long, y'all are trying to focus on preparing for the things they need for school?

"A. Yes. We have a more structured [program] than just a day care. Structured, getting them ready, like I said, to handle when they do go to kindergarten.

"Q. Do you consider — well, first of all, let me ask you, how many days a week do y'all teach in a pre-K structured environment?

"A. Five days.

"Q. So five days of teaching is offered?

"A. Yes.

"Q. Is it offered that a child can go part-time?

"A. Yes, it is. And in my classroom.

"Q. And what days would a child, if the child was going part-time, what days would a child be there?

"A. Normally, it's Monday, Wednesday, and Friday. But sometimes we are flexible with that.

"Q. Okay. Do you have an opinion as to a child, the importance of attendance?

"A. Well, of course the more classroom time and teaching time you get, of course that's beneficial. So if they are there five days, then they are going to get more than if they are there two or three days. That's common sense.

"Q. Is there anything about this particular instruction method or workbook method that makes regular attendance even more important in your eyes, about how those workbooks work or anything?

"A. Well, they are all, they are correlated to work together. And something we'll do maybe on a Monday, Tuesday would be just reemphasizing it in a different way, because repeating things is how children do learn. So naturally we are building all week.

"Q. So one day is building on the next day?

"A. Yes.

"Q. So do you consider regular attendance to be important?

"A. Yes."

Although Coleman testified that, as a teacher, she could adapt to the child's four/four custody arrangement and that she would work with the father in coordinating the child's schoolwork, she also stated:

"Q. And would you think that a parent could at home do as good of a job, or the same job that you can do with peer interaction in classroom preparedness, and follow the teacher's instruction and classroom discipline, and those kind of things, as far as getting ready for real school kindergarten?

"A. Well, it wouldn't be the same. Because I think having the peers there is part of the

learning, how to get along with others, and how to work well together."

Likewise, Myra Carter, a licensed social worker who specialized in parenting and who attended church with the mother and the child, testified as follows:

"Q.... I think you have previously testified about some acting out when she was younger

"A. (Nods head affirmatively)

"Q. — after some extended visitation?

"A. Right.

"Q. Have you noticed any of that?

"A. She's more clingy, I notice, when she comes back, with her mom, not wanting to drop her off to her room, and needs to stay out with the hall with me for a little while until I can sort of coax her back in. And she doesn't normally do that. She likes her friends, and you know, those kind of things."....

"Q. And as far as the current parenting plan, you are very familiar with their four day on, four day off?

"A. Right.

"Q. Based on your experience, do you have an opinion as to whether that, and based on what you have seen from [the child] and the actions you have seen, but further, based on your experience and your training and your knowledge, do you have an opinion as to whether that would be in [the child's] best interest?"....

"A. If I were writing a behavior plan or a parenting plan in my capacity with family connections, no, I would never encourage four here, four there, for the simple reason that it makes it very difficult for both parents, but especially for the child. It's hard for them to build or to be a part of something on a consistent basis. You know, and any time in a divorce situation, it's all about the child and, you know, just making sure that they are comfortable and making sure that they understand and know that both parents need them to feel comfortable and to thrive. And I think that would be the goal, to see a child her age, we want to see her develop and grow.

"Q. Talking about developing, can you talk a little bit or explain a little bit the importance of a stable plan or stable environment? And I keep hearing and reading at different times about this continuity term, of the continuity of experience. Can you talk a

little bit about that as it applies to development of a child?

"A. Well, I think consistency is very important, even for us as adults. I think consistently being and understanding, you know, this is her world here. She has two separate worlds, two separate different places. And so it's really hard to implement something, or to grow and develop in two totally different worlds, like that.

"Q. And I guess the flip side of that is, to a certain extent, isn't that always the reality we are faced with, with a divorce situation?

"A. It is. But usually there is at least a little — four here and four there is, you know, a little bit harder, I think. You know, I've not ever heard of that personally.

"Q. You think that's the extreme?

"A. I think that's very much the extreme.

"Q. As far as your opinion on that issue, do you have an opinion as to what type of plan might could work in a situation like this, where you have two good, both parents fit, good, loving, involved —

"A. Absolutely, uh huh.

"Q. – that want to be involved, and want to participate? Do you have an opinion of what type of plan would be beneficial to [the child] and in her best interest?

"A. Pick one location and let her start developing and building a life, I think, would be very, very positive, because there is already enough negatives even in a great situation that she would work through. I just think that she could thrive in a situation where she feels like she could make friendships, get to know people, build on that. And I agree, I think both parents would want the best interest, you know, have the best interest of this child. "....

"Q. Okay. As far as encouraging involvement with the other parent, you fully support two parents being active and involved in a child's life, don't you?

"A. Oh, absolutely. Most definitely.

"Q. So is it your opinion that you just feel a primary residential designation, primary physical custodian is in the best interest of a child so that a child can participate and have stability, and develop her own life experience?

"A. That's exactly right. She has to come back in and start new every time she comes

back there or comes back here. I mean it's a new situation for her.

"Q. Okay. And there's been a lot of talk, were you familiar with [the child's] starting pre-K?

"A. Yes."....

"Q. ... But as far as stability and having those experiences, you would say that would apply to a pre-K setting as well as church or extracurricular —

"A. Definitely."....

"Q. When you testified ... in the [Tennessee Chancery Court] proceeding, did you express concerns that would be relevant if there was a lack of stability in a child's life?

"A. Yes.

"Q. And based on what you have seen in [the child's] demeanor, and in this current situation with four on and four off, have your concerns been alleviated, or have they been confirmed?

"A. No. I still think there needs to be a consistent plan, one place, for her to be able to thrive and to grow.

"Q. Okay. And have, again, have you seen some of those concerns?

"A. Again, yeah.

"Q. Okay. And those concerns have not gone away?

"A. Correct.

"Q. Do you expect the negative impact that you talked about with friends going on and her not being able to be involved, and activities and those types of things, would you expect those to get better or worse as she gets a little older?

"....

"A. Definitely. It will do nothing but get worse."[187]

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[187] We recognize that the child will still experience changes of custody under the primary custody/visitation arrangement ordered by the circuit court. Based on the evidence seen and heard, however, the circuit court could have concluded that a change to primary physical custody being with the mother, with visitation as ordered for the father, would help alleviate, at least to some degree, problems that had developed with the four/four custody arrangement.

Furthermore, Robert D. Young, professor of early childhood education at the University of North Alabama, testified:

> "Q. What do you consider to be some of the most important factors as far as a well-adapted, appropriately developed, important factors in the child development, to achieve an appropriate child development in a child

> "A. One of the most important factors in a young child's life is what the literature will call continuity of experience. And that would mean in all areas that would fall under the areas of the realms of cognitive, physical, social, and emotional. So that would be learning activities, scheduling, play time, individual group, how the parents and caregivers interact with the child, discipline, and so forth. The more consistent it is, the better it is for the child's overall development. It has an impact on things such as the child's ability to trust, to take initiative in learning experiences, to get to the point where they want to accomplish tasks. They take pride and, through that develop self-esteem through their accomplishments and so forth. If the continuity is broken every so often it's not a major detriment. If it's a continual upset in the child's experiences, it can cause, well, the opposite of things I just mentioned, a lack of trust, a lack of willingness to take initiative. It can develop feelings of guilt, shame, doubt, in

one's own abilities and so forth. A child will with the continuity of experience — most children are natural risk takers in their learning. They are very interested in figuring out the world. When there is less consistency in the child's life, it has a negative effect on their willingness to take risks in learning situations, so that they become more inhibited, more cautious. And that would inhibit their learning as well. A child, during these years — there is another term called mastery through repetition. A child needs a great deal of time to go over and over the same activity, the same experience. That's why you will have a young child ask the parent or caregiver to read the same book over and over again. They instinctively have that desire for repetition. They have to; it takes them longer to process their learning than it does us, at the adult level. So they need that extended period of times for repetition. And going back to the continuity of experiences, with the continuity the opportunities for adequate repetition helps the child master the learning experiences. And that's not just the cognitive learning but it's social emotion, and physical as well.

"Q. As far as that continuity of experience, would you in your opinion, have a concern that that may be broken if a child didn't attend a pre K program regularly?

"A. If they were, if their attendance was haphazard?

"Q. Yes.

"A. Oh, absolutely. It would have a detriment. Could be significant.

"Q. What if their attendance at a church with their peer group in their church child's group, was that same way?

"A. Well, I was going to say children. But all of us have a desire to feel as if we belong with a group, so forth. If a child's experiences with the group and attendance with the groups, the times they meet and so forth, is broken, is interrupted for whatever reason, the child might not develop that sense of belonging. And through that, a sense of love, being able to receive it and give it, and so forth, with their, whatever group it would be. So yes, I would.

"Q. Do you have any opinion as to how a custody plan of a four-day, or parenting plan with four days with one parent in Florence, followed by four days with one parent in Decatur, may affect a child adversely or benefit a child, or have any impact on this continuity that you are talking about?

"A. I would not see a benefit to the child. My feelings when I heard about that was, the

> decision was not made on the best interest of the child. It was made, I won't try to guess why it was made. But I cannot see it as being in the best interest of the child for any way."

The foregoing testimony would support a conclusion by the circuit court that the four/four custody arrangement had become problematic for the child and that the problems were only going to get worse when the child began the pre-K program. [3]

In addition, we note that there was some consideration given at the prior custody proceeding in Tennessee to the father's relocating from Decatur to Florence when the child began "school." Though the "school" under consideration at the time apparently was kindergarten, the parties agreed to enroll the child in the pre-K program. The Tennessee Court of Appeals noted that there might be problems with the four/four custody arrangement when the child started school.

Also, in regard to the father's moving to Florence, there was testimony that the father committed to move in 2004 and again in 2005 and that he committed to begin moving his business to Florence as well; the testimony would support the conclusion that the father could easily have moved his photography business to Florence. The father's most recent commitment was that he would move to Florence in the summer of 2006. It is undisputed, however, that the father did not follow through on his commitments to relocate to Florence. Instead, he

threatened the mother that he would attempt to obtain primary physical custody instead of moving, even before the mother filed her petition in the Lauderdale Circuit Court seeking primary physical custody. Based on the tenor of the testimony concerning the father's commitments to move, other testimony, and the fact that the father filed a counterpetition seeking sole custody of the child shortly before the final hearing in the present case, the circuit court could have concluded that the father had no intention of moving or that he had failed to act in good faith regarding moving and that, in that regard, he had placed his own self-interest above the child's best interest.

The circuit court also could have concluded that, despite the father's testimony that he believed such things negatively affected the child, the father had instigated contentious conversations with the mother in the child's presence. Although the father attempted to blame the mother for these conversations, the circuit court could have concluded that the father was at fault. Likewise, the circuit court could have concluded generally that the father was being untruthful and evasive in his testimony and that he was attempting to mislead the court in an effort to obtain sole custody of the child.

In any event, based on the foregoing, and other testimonial and documentary evidence (including the testimony of the maternal grandmother), the circuit court implicitly concluded, after an ore tenus hearing, that a material change in circumstances

had occurred since the entry of the September 2003 order and that it was in the best interest of the child for the mother to have primary physical custody. As discussed above, the task of an appellate court is not to reweigh the evidence, but to determine if there is sufficient evidence to support the trial court's ruling. Based on our review of the record, we must conclude that there was sufficient evidence in this regard and, therefore, that the Court of Civil Appeals erred in reversing the judgment of the circuit court.[19]

2. Application of Watters

In the present case, the Court of Civil Appeals relied on Watters for the proposition that the mother bore the "burden of showing that a material change of circumstances had occurred that affected the child's welfare since the last custody order." See, e.g., Watters v. Watters, 918 So. 2d 913, 916-17 (Ala. Civ.

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[19] As discussed in Headrick v. Headrick, 916 So. 2d 610, 615 (Ala. Civ. App. 2005), alternating-custody arrangements can be disruptive to a child if the parents do not live in the same community. See also Ala. Code 1975, § 30-3-152 (factors relevant to a joint-custody award include "[t]he geographic proximity of the parents to each other as this relates to the practical considerations of joint physical custody"); see also Poe v. Capps, 599 So. 2d 623, 624-25 (Ala. Civ. App. 1992) (concluding that an alternating annual-custody arrangement "was workable and satisfactory with the parents and the child until the child became old enough to enter school. ... The father's petition to modify that unique custody arrangement appears to be a step towards providing academic stability for the child by having the issue of custody finally adjudicated").

App. 2005)." Davis, ___ So. 3d at ___. It went on, however, to state:

> "The evidence shows that the only change that has occurred has been the natural progression of the child to prekindergarten school. However, the mother has not demonstrated how this change, in the context of the joint-custody arrangement, has affected the child's welfare or best interest. The evidence shows that the child could attend prekindergarten part-time and that the father could instruct the child on the days she did not attend. The child thrived in a similar arrangement in day care. The mother presented no evidence to indicate that the child would not continue to thrive while in pre-kindergarten under the same arrangement. The only other relevant evidence the mother presented showed that the child expressed anxiety at exchanges and that she would miss school, church, and extracurricular activities if the current custody arrangement was maintained. However, as the father points out, even under the physical-custody arrangement approved by the Alabama trial court, the child would still experience exchanges and would still miss activities."

___ So. 3d at ___.

We first note that the record before us is in conflict with the Court of Civil Appeals' conclusion that "the mother presented no evidence to indicate that the child would not continue to thrive while in pre-kindergarten under the same [four/four custody] arrangement." ___ So. 3d at ___. The testimony presented, including that of the mother, Young, Carter, and Coleman, along with the inferences the circuit court was free to draw from the testimony, was more than adequate to call into question whether the child would "thrive" in the pre-K program if the four/four custody arrangement continued.

The Court of Civil Appeals also relied on the fact that the "only change" at issue involved what it termed a "natural progression of the child to prekindergarten school." ___ So. 3d at ___. To the extent that this statement implies that a "natural progression" cannot be a material change in circumstances, it is at odds with the practical realities of life. By definition, a "progression" reflects a change from some prior state, in this case from the prior state of facts on which the Tennessee trial court based its judgment. The issue is whether the change is a material one, so far as the custody of the child is concerned, whether it is natural or not. To say that a change of custody cannot be based on the change in the child's needs simply because the change itself reflects a "natural progression" is to ignore the best interests of the child in favor of a more rigid, court-manufactured view, particularly, where, as in the present case, there is no indication

that the "natural progression" was considered as part of the basis for the prior judgment.[209]

D Conclusion

Based on the foregoing, the decision of the Court of Civil Appeals is due to be and is hereby reversed, and the cause is remanded to that court for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Cobb, C.J., and Lyons, Stuart, Smith, and Shaw, JJ., concur.

Murdock, J., concurs specially.

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[9] "Indeed, the converse is true here. As noted, the Tennessee Court of Appeals, in affirming the judgment of the trial court that fashioned the preexisting four/four custody arrangement, stated in its opinion:

"Shuttling [the child] back and forth every four days will no longer be in her best interests when she begins school. [The mother] insists that these potential difficulties provide a sufficient basis to vacate the revised residential schedule and to designate her as the primary residential parent. We respectfully disagree. Courts must base their decisions on the evidence of what has already happened, not on speculation about what might happen in the future."
(Emphasis added.)

Woodall, Bolin, and Parker, JJ., concur in the result.

MURDOCK, Justice (concurring specially).

I concur in the main opinion. I write separately to comment on the citation by the Court of Civil Appeals to Watters v. Watters, 918 So. 2d 913 (Ala. Civ. App. 2005), for the proposition that the mother had a "burden of showing that a material change of circumstances had occurred that affected the child's welfare since the last custody order" and of "demonstrat[ing] how this change ... has affected the child's welfare or best interest." Davis v. Blackstock, [Ms. 2060017, June 29, 2007] ___ So. 3d ___, ___ (Ala. Civ. App. 2007). See Watters, 918 So. 2d at 916 ("the party seeking the modification of custody must prove 'a material change of circumstances of the parties since the prior [judgment], which change of circumstances is such as to affect the welfare and best interest of the child or children involved'" (quoting Ponder v. Ponder, 50 Ala. App. 27, 30, 276 So. 2d 613, 615 (Civ. App. 1973))).

I find these articulations of the standard for modifying custody, including the above-cited articulation provided by Watters itself, to be potentially confusing and misleading. First, I note that it is not necessary to show a change of circumstances that has adversely affected the child's interests. As the opinion in Watters, itself, notes:

"Although some older custody cases indicated that an adverse impact on a child must be shown before a parent would be entitled to a change of custody, see, e.g., Lewis v. Douglass, 440 So. 2d 1073 (Ala. Civ. App. 1983), overruled by Ex parte McLendon, 455 So. 2d [863,] 866 [(Ala. 1984)], and Simpson v. Gibson, 420 So. 2d 782 (Ala. Civ. App. 1982), overruled by Ex parte McLendon, 455 So. 2d at 866, our supreme court has, on more than one occasion, clearly stated that custody modifications do not require proof of a material change of circumstances that has adversely or detrimentally impacted the child. See Ex parte Murphy, 670 So. 2d 51, 53 (Ala. 1995); Ex parte McLendon, 455 So. 2d at 866; and Ford v. Ford, 293 Ala. 743, 744, 310 So. 2d 234, 235 (1975) (correcting a statement of the law from an opinion of the Court of Civil Appeals regarding custody modifications by omitting the word 'adversely'). Instead, the party seeking the modification of custody must prove 'a material change of circumstances of the parties since the prior [judgment], which change of circumstances is such as to affect the welfare and best interest of the child or children involved.' Ponder v. Ponder, 50 Ala. App. 27, 30, 276 So. 2d 613, 615 (Civ. App. 1973)."

918 So. 2d at 916.

More generally, the standard as articulated in the opinion of the Court of Civil Appeals and in Watters suggests that the change of circumstances, itself, must have had an effect on the child's "welfare and best interest." I believe a clearer way to express the operative standard is to say simply that the party seeking the custody modification must show (1) a material change in circumstances since the prior judgment and (2) that a change of custody in response to that change in circumstances will be in the child's best interest.

APPENDIX H

IN THE SUPREME COURT OF ALABAMA

February 19, 2010

1061445 Ex parte Tonya Blackstock. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: Mark Davis v. Tonya Blackstock) (Lauderdale Circuit Court: DR-06-86.01; Civil Appeals : 2060017).

CERTIFICATE OF JUDGMENT

WHEREAS, the ruling on the application for rehearing filed in this case and indicated below was entered in this cause on February 19, 2010:

Application Overruled. No Opinion. PER CURIAM - Cobb, C.J., and Lyons, Woodall, Stuart, Smith, Bolin, Parker, Murdock, and Shaw, JJ., concur.

WHEREAS, the appeal in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on September 11, 2009:

Reversed And Remanded. PER CURIAM - Cobb, C.J., and Lyons, Stuart, Smith, and Shaw, JJ., concur. Murdock, J., concurs specially. Woodall, Bolin, and Parker, JJ., concur in the result.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date.

IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 19th day of February, 2010.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

APPENDIX I

REL: 04/02/2010

Notice: This opinion is subject to formal revision before publication in the advance sheets of **Southern Reporter**. Readers are requested to notify the Reporter of Decisions, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104 3741 ((334) 229 0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in **Southern Reporter**.

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2009-2010

2060017

Mark Davis

v.

Tonya Blackstock

Appeal from Lauderdale Circuit Court
(DR-06-86.01)

After Remand from the Alabama Supreme Court

MOORE, Judge.

On June 29, 2007, this court reversed that part of a judgment entered by the Lauderdale Circuit Court ("the trial court") modifying a prior judgment entered by a Tennessee, court, which had awarded Mark Davis ("the father") and Tonya Blackstock ("the mother") joint custody of their minor child, by awarding the mother primary physical custody of the child. See Davis v. Blackstock, [Ms. 2060017, June 29, 2007] ___ So. 3d __ Ala. Civ. App. 2007). Although the issue of child support was raised by the father on appeal, we noted in our prior opinion that our reversal of the judgment with regard to custody would necessarily impact the child-support award, and we remanded the cause for the trial court to reconsider its child-support award. ___ So. 3d at ___ .

This court's prior judgment has now been reversed by the Supreme Court of Alabama. Ex parte Blackstock, [Ms. 1061445, Sept. 11, 200] __ So. 3d ___ (Ala. 2009). In compliance with the supreme court's opinion, the trial court's judgment relating to the modification of custody is affirmed. Therefore, we must now address the issue of child support.

The father argues that the trial court's child-support award to the mother of $469 per month was in error. The trial court attached a Form CS-42 Child-Support Guidelines statement, see Rule 32, Ala. R. Jud. Admin., to its September 1, 2006, judgment. Based on the parties' incomes, the trial

court determined the basic child-support obligation to be $540. The trial court then added child-care costs of $364, resulting in a $904 total child-support obligation. The father's percentage share of the parties' income is 48.13%, and the mother's percentage share is 51.87%. Therefore, the mother's share of the $904 total child-support obligation is $469, and the father's share is $435. It appears that the trial court inadvertently ordered the father to pay the amount of child support that, according to its calculations, the mother would have been obligated to pay had the father been awarded primary physical custody of the child. Thus, we conclude that the trial court's award of child support is in error.

We also note that, although the trial court ordered that "the child shall have medical insurance coverage from her mother's husband through his place of employment, if it available," the trial court failed to include the health-insurance costs in the total child-support obligation. When this action was filed, Rule 32(B)(7), Ala. R. Jud. Admin., provided, in part[21]:

> "(a) The actual cost of a premium to provide health insurance benefits for the children shall be added to the 'basic child support obligation' and shall be divided between the parents in proportion to their

[1] Rule 32 was amended effective January 1, 2009. However, because this action was filed before January 1, 2009, the amended rule does not apply in this case. See Rule 32, Preface Relating to Scope.

> adjusted gross income in the percentages indicated on the Child Support Guidelines form (Form CS-42).
>
> "(b) The amount to be added to the 'basic child support obligation' shall be the actual amount of the total insurance premium for family/dependent coverage, regardless of whether all children covered are in the same family."

See also Balfour v. Balfour, 660 So. 2d 1015, 1017 (Ala. Civ. App. 1995). The trial court did not state any reasons for deviating from the child-support guidelines. "A trial court's failure to apply the guidelines or to explain why the deviation occurred, requires reversal." Spillers v. Spillers, 707 So. 2d 256, 258 (Ala. Civ. App. 1997).

Based on the foregoing, the trial court's judgment pertaining to custody is affirmed. That portion of the trial court's judgment pertaining to child support is reversed, and the cause is remanded for the trial court to recalculate the father's child-support obligation in accordance with Rule 32 and this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Thompson, P.J., and Pittman, Bryan, and Thomas, JJ., concur

APPENDIX J

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Article IV, Section 1

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of

every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

APPENDIX K

Alabama's joint custody statute
Ala. Code 30-30-150 through 30-3-157:

30-3-150. Policy of state. It is the policy of this state to assure that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interest of their children and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or dissolved their marriage. Joint custody does not necessarily mean equal physical custody.

30-3-151. Definitions. For the purposes of this article the following words shall have the following meanings:

(1) Joint custody. Joint legal custody and joint physical custody.

(2) Joint legal custody. Both parents have equal rights and responsibilities for major decisions concerning the child, including, but not limited to, the education of the child, health care, and religious training. The court may designate one parent to have sole power to make certain decisions while both parents retain equal rights and responsibilities for other decisions.

(3) Joint physical custody. Physical custody is shared by the parents in a way that assures the child frequent and substantial contact with each parent. Joint physical custody does not necessarily mean physical custody of equal durations of time.

(4) Sole legal custody. One parent has sole rights and responsibilities to make major decisions concerning the child, including, but not limited to, the education of the child, health care, and religious training.

(5) Sole physical custody. One parent has sole physical custody and the other parent has rights of visitation except as otherwise provided by the court.

30-3-152. Considerations by courts; factors considered.

(a) The court shall in every case consider joint custody but may award any form of custody which is determined to be in the best interest of the child. In determining whether joint custody is in the best interest of the child, the court shall consider the same factors considered in awarding sole legal and physical custody and all of the following factors:

(1) The agreement or lack of agreement of the parents on joint custody.

(2) The past and present ability of the parents to cooperate with each other and make decisions jointly.

(3) The ability of the parents to encourage the sharing of love, affection, and contact between the child and the other parent.

(4) Any history of or potential for child abuse, spouse abuse, or kidnapping.

(5) The geographic proximity of the parents to each other as this relates to the practical considerations of joint physical custody.

(b) The court may order a form of joint custody without the consent of both parents, when it is in the best interest of the child.

(c) If both parents request joint custody, the presumption is that joint custody is in the best interest of the child. Joint custody shall be granted in the final order of the court unless the court makes specific findings as to why joint custody is not granted.

30-3-153. Plan by parents.

(a) In order to implement joint custody, the court shall require the parents to submit, as part of their agreement, provisions covering matters relevant to the care and custody of the child, including, but not limited to, all of the following:

(1) The care and education of the child.

(2) The medical and dental care of the child.

(3) Holidays and vacations.

(4) Child support.

(5) Other necessary factors that affect the physical or emotional health and well-being of the child.

(6) Designating the parent possessing primary authority and responsibility regarding involvement of the minor child in academic, religious, civic, cultural, athletic, and other activities, and in medical and dental care if the parents are unable to agree on these decisions. The exercise of this primary authority is not intended to negate the responsibility of the parties to notify and communicate with each other as provided in this article.

(b) If the parties are unable to reach an agreement as to the provisions in subsection (a), the court shall set the plan.

30-3-154. Records and information.

Unless otherwise prohibited by court order or statute, all records and information pertaining to the child, including, but not limited to, medical, physiological, dental, scholastic, athletic, extracurricular, and law enforcement, shall be

equally available to both parents, in all types of custody arrangements.

30-3-155. Application of Rule 32 of Rules of Judicial Administration.

In making a determination of child support, the court shall apply Rule 32 of the Alabama Rules of Judicial Administration

.

30-3-156. Interference with custody.

The fact that joint custody has been awarded to both parents shall not preclude a court from finding that one parent has committed the crime of interference with custody as provided in Section 13A-6-45, or has violated the Uniform Child Custody Jurisdiction Act as provided in Article 2 (commencing with Section 30-3-20) of Chapter 3 of this title.

30-3-157. Applicability; modification of order.

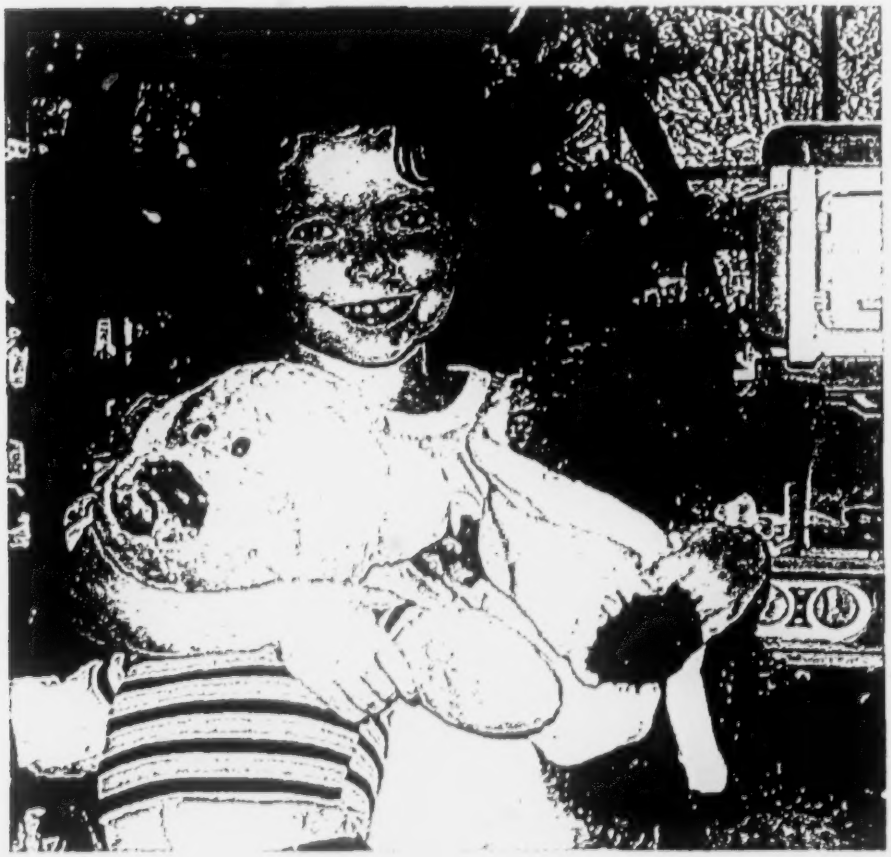
This article shall not be construed as grounds for modification of an existing order. This article shall not be construed as affecting the standard applicable to a subsequent modification.

HISTORY: Acts 1996, No. 96-520.

EFFECTIVE DATES. Acts 1996, No. 96-520, effective January 1, 1997.

APPENDIX L

Alabama Trial Court Exhibit 12



Katie Nichole Davis, Christmas Day Morning At Home with Dad, December 25, 2005.

APPENDIX M

1061445

IN THE SUPREME COURT OF ALABAMA

TONYA BLACKSTOCK
PETITIONER

V.

MARK DAVIS
RESPONDENT

APPEAL FROM THE CIRCUIT COURT OF
LAUDERDALE COUNTY

CASE NO. DR 2006-86.01

APPLICATION FOR REHEARING AND BRIEF IN SUPPORT OF
APPLICATION FOR REHEARING

Heath F. Trousdale
119 South Court Street
Florence, Alabama 35630
256-767-1058

ATTORNEY FOR RESPONDENT

APPLICATION FOR REHEARING

Comes now the Respondent, Mark Davis, by and through the undersigned counsel of record, pursuant to Rule 40 of the Alabama Rules of Appellate Procedure and applies to this Honorable Court for a rehearing in the above styled case, and as grounds therefore would state as follows:

I. The Court of Civil Appeals gave appropriate deference to the Circuit Court's implicit findings and resulting judgment when it concluded correctly that the Mother failed to meet her burden of proof.

II. The trial court improperly considered items of evidence, specifically the testimony of Dr. Robert Young and/or Myra Carter on the issue of custody when neither had a basis for their opinion and their opinion was against the stated policy of this State.

III. The opinion raises numerous issues of constitutional proportions under the United States Constitution and the Alabama Constitution.

STATEMENT OF FACTS

The Respondent submits the following statement of facts, pursuant to Alabama Rules of Appellate Procedure, Rule 40(e) as the Respondent is not satisfied with the facts stated in the main opinion of the Supreme Court.

The Father of the child lives in Decatur, Alabama and works as a freelance photographer. R 291. The Mother lives in Florence, Alabama and works as a bankteller. R 5. The Father lives in a two (2) bedroom, two (2) bath apartment. He lives there alone except for the parenting time with his daughter. R 288. The Mother, at the time of trial, lived with her husband Terry Blackstock and her sixteen (16) year old son from a prior relationship. R 37. The Mother was subsequently divorced from Mr. Blackstock by order of the Circuit Court of Lauderdale County.

The parties in this case were divorced by the Chancery Court of Lawrence County, Tennessee on February 15, 2002. C 8-9. The parties were awarded joint decision making authority on all aspects of the child's life except for extracurricular activities. C 10. The Mother was allowed to care for the child at all times except for 2 hour visitation with the father three days a week. Due to the young age of the child, the Father received this very limited visitation in

the original parenting plan. C 11. He did, however, visit each and every opportunity he was given. R 74. Communication was a problem even before the divorce was final with problems including, but not limited to, the fact that the Mother selected the pediatrician and the daycare without first consulting with the Father. R 103, 295, 234. In fact, the Mother initially didn't even tell the daycare that the child had a Father. R 295. The parties had difficulty in communicating in 2001 because of her inconsistent actions and refusal to communicate and that has stayed consistently the same since that time. R 241. The Father began communicating with the Mother by letter correspondence dating back to 2001 and that has stayed essentially the same as well. R 245. Additionally the court appointed counselor advised the father to send written communication since verbal communication was unsuccessful. R 282.

Due primarily to the limited visitation and the unwillingness of the Mother to work well with the Father, he petitioned for a modification that was heard in July 2003. Judge Stella Hargrove from the Chancery Court of Lawrence County, Tennessee, modified the parenting plan on September 3, 2003 so that each parent had the child equally for four (4) days on a rotating basis. C 16-19, R 8. This arrangement has worked very well. R 77,341,268. The Court saw fit to include language complimenting the Father on his willingness to be involved and provide nurturing and love to the minor child. C 17. The Court also terminated child support at that time. C 17. The attorneys for the parties at that time met and agreed that child support ceased at the

time of the hearing when the Judge ruled orally from the bench that the parties would implement the four (4) days on and four (4) off custodial arrangement. R 72, 377. Because the lawyers reached this agreement after some child support had been paid, the resulting overpayment of child support has been dealt with by the Father by giving the Mother credit on that amount when medical expenses owed to her arose. R 377, 54, 61.

The Mother appealed Judge Hargrove's order to the Court of Appeals of Tennessee. The Court of Appeals issued an order on October 12, 2004 affirming the trial court's award of equal parenting time and remanded the case to the trial court to modify its order consistent with a recently decided case in Tennessee. C 39-45. The Appeals Court took special care to highlight and applaud the Father's parenting and care of the child while admonishing the Mother, saying "this record contains abundant evidence that Ms. Smith (Mother) has refused to adhere to the plain requirements of the parenting plan and that she has purposely and deliberately embarked on a course which, if not stopped, would eventually erode the relationship between Mr. Davis and Katie". C 42. The trial court in Tennessee as to this day has not modified its order per the instructions from the Court of Appeals of Tennessee.

In the interim, both parties moved to Alabama and the Mother, while the case is still pending in Tennessee, filed this action to modify. C 5.

A petition for modification filed by the Mother claimed only that the child would be starting "school" in the fall of 2006 and the custodial arrangement would no longer be workable. This was the only allegation made in the petition that any change in circumstance had occurred. C 6. The Father counter petitioned for contempt and amended his counter petition to add a claim for modification of the custodial arrangement, requesting custody.

At the time of 2003 order, the child was attending First Assembly daycare when she was with the Mother. The child had always done very well in the daycare program at First Assembly. R 46, 230, 332. The child is actually not going to start school (kindergarten) until the fall of 2007. R 100. The "school" that was made the basis for the Mother's petition was a pre-K program in which the Mother wanted to enroll the child at Wilson School. The Father learned about the Mother's desire to send the child to Wilson around the time he received the custody petition. R 322. She did not discuss the matter with him and responded that it was a legal matter. R 323. Because this daycare at Wilson school concluded at 2:30 p.m., the child was going to have to be bussed back over to another daycare in town called Playworld. R 106. The Father preferred that the child stay at First Assembly so that she would not have to ride the bus. R 325. Nonetheless, the Father went to both Wilson and Playworld to see what type of program they had. R 324. When the petition was filed in February, 2006, the only change in circumstance that the mother was alleging was that she was starting school in the Fall of 2006. R

93. The Father agreed for the child to go to Wilson's daycare when she was with the Mother but would not agree to bring her to the program when she was with him. It is well established that the Father works very closely with the child on all of the things that are being addressed in daycare. R 119, 336. The Father would send the custody schedule to the daycare along with self-addressed stamped envelopes where they could send back the child's work so that the Father could work with her on these goals. R 327, 157, 138. The Father estimated that he worked with the child approximately two (2) hours per day on learning the same basics taught in daycare and pre-K. R 331, 47, 138. The child can already do most of the things that will be covered in the upcoming year at First Assembly. R 50. In August, after the Mother found out a little bit more about the Wilson program, she suggested the child stay at First Assembly because she did not like the facilities at Wilson. R 14, 107, 326. The child is still at First Assembly, where she has been all along. R 326. First Assembly has a part time program with no attendance requirements. R 95, 109, 147. The Mother only pays for the days that the child attends the facility. R 136.

There is no structure in the program during the summer or holidays. R 153. First Assembly has a K-4 program. R 48. That program consists of approximately 1½ hours of "instruction time" per day. R 114. This is fairly typical of other daycares. R 115. All agreed that parents can work with children at home on any and all of the curriculum items addressed at pre-K. R 209, 210, 157. All also

agreed to the statement, as well as to the mission statement in the Alabama Pre-K Initiative, that parents are the foremost important teachers to young children. R 157, 204, 118. Pre-K is not mandatory but can be beneficial to children depending on the program. R 190, 201. A debate exists amount scholars whether a child is more successful being taught at home prior to kindergarten or in pre-K programs. R 202. Interestingly, Dr. Young has little knowledge of the Alabama Pre-K Initiative but he is listed as the supervisor of the only pre-K model class room in Alabama, which is funded by a grant from the Alabama Pre-K Initiative which is guided by the Alabama Office of School Readiness. R 204., Ex. 1. Incidentally, the Mother made the same argument at the 2003 hearing, attempting to resist the Father's desire to be a more active parent, by saying that the eighteen month old child "needs schooling" and "needs spontaneity of daycare to go into school". R 116.

Without amending her petition, the Mother alluded to potential additional ground for modification, by giving an interrogatory answer that the child had suffered some anxiety. She also stated at trial that the child misses out on some activities while with the Father. R 94. The Mother said the child might be interested in playing t-ball or cheerleading and has missed two (2) birthday parties in the last year. R 16, 18. She also stated she misses some church activities and did not know some of the songs from those activities. R 19. The Father stated then and has maintained since the 2003 order, his

intention to move to the child's school district when the child starts school in August of 2007. R 66,319. There was some testimony that he had intended to move sooner but did not, due to the Mother's petition. R 318. Certainly, the child can participate in local activities when the father moves to Florence. R 123. Nonetheless, the Father has her involved in numerous activities in Decatur. The child is active in gymnastics and church. R 122, 252. The Father attends each gymnastics practice and meet and attends virtually every activity the child has in Florence. R 336, 337, 378, 22. The parties being able to attend events while the child is with the other parent has improved. R 379. The Mother admitted that she wanted the Father involved with the child and that it was no difficulty to keep him informed about what is going on with the child. R 9, 66. All agreed that it is important that both parents be very involved in the child's life. R 35, 75, 178, 322.

The Mother also now claims that the child has more anxiety and that she has, on occasion, cried at exchanges. R 22, 23, 218. The Father has also noticed that the child would cry at exchanges and that this occurred only on a few occasions and even occurred on occasions when the child was crying to stay with the father. R 309, 311. The Mother video taped the exchanges from November, 2004 until January, 2005 for some reason. No video evidence was presented at trial about any anxiety at exchanges. R 311. The maternal Grandmother even admitted that the anxiety of the child has been the same for months and even years. R 220. Nonetheless, the Father, nor any of the numerous

individuals who have almost daily contact with the child, have noticed any noticeable anxiety. R 155, 265, 267, 277, 279, 342. The individuals who spend time with the child while the child is with the father have noticed no changes in the child's demeanor or behavior in the last couple of years. R 254, 265, 266. These other individuals include the daycare teacher that has obviously seen the child consistently at the daycare; the paternal grandmother, who sees the child at least eight (8) hours every visit; the paternal aunt, who keeps the child from time to time; and the cousin of the father, who visits approximately every other weekend with the child. R 144, 274, 251, 261. The child's church ministry director did state that she appears clingy when she returns from visits. R 169. The only time the child has ever expressed any anxiety about visiting with the father was when she told the father she didn't want to visit anymore and that her mother told her to say that. R 350.

It was undisputed that the father primarily communicates with the mother by written correspondence and that this had been going on since well before the 2003 order. The Mother complained that many of the letters were negative or degrading. R 10, 36. However, she stated that she didn't mind the letters if they were about Katie. R 10. Testimony indicates that the letters were all about the child in some form or fashion and every letter contained some reference to how the child is doing. R 181, 313. Letters were entered into evidence and referenced everything from medical issues to the Father's repeated requests to simply have the child's hair cut by a professional stylist. R

305, Ex. 22. The mother and the grandmother indicated great annoyance by the letters and dissatisfaction to consulting with the father on major decisions regarding the child. R 224, 80.

In a simple oversight, the Court mistakenly used what would be the mother's portion of the child support ($469.00) as the amount the Father was ordered to pay when, in fact, the Father's portion should have been $435.00 per month. C 76, 84.

It was undisputed that both parties are excellent parents to the child. R 75, 83, 118, 230, 253, 278, 322, 340. The Mother agreed that the pre-K schooling was not more important than spending time with the Father's child ever. R 116, 120. The Mother agreed that the Father is a very responsible father and the parties' daughter and the father love each other very much. R 118.

The opinions of the church ministry director are the same as they were when she testified in 2003 as the child was acting out and aggressive in 2003. R 176. It was agreed that the verbal communication between the parents was not very good but that the parties now communicate primarily by letter. R 79. Any problems with the medication have now been resolved and are no longer a problem. R 88, 302. The child has gotten older and talks on the phone more often to both parties. R 299. The church ministry director described the child as very bright, well adjusted and doing well. R 184. The maternal

grandmother described the child as very progressed for her age. R 214.

STATEMENT OF THE CASE

The parties were divorced by order of the Chancery Court of Lawrence County, Tennessee on February 15, 2002. The permanent parenting plan in the divorce decree provided the mother would have responsibility for the care of the child except for three 2 hour visitations per week with the father, while the mother and father shared joint decision making on all but extra curricular activities. The divorce decree was modified by the Chancery Court of Lawrence County, Tennessee on September 3, 2003. The Court at that time, recognizing and being impressed with the Father's actions and involvement with the child to that point, ordered the parties to share physical and legal custody of the child on a four (4) day with each parent rotating schedule. The Mother appealed this order to the Court of Appeals of Tennessee. That Court affirmed the custody portion of the order and in doing so, stated in its opinion very strong language about the conduct of the Mother up to that point, saying that the record contained abundant evidence that the Mother had refused to adhere to the plain requirements of the parenting plan and that she had purposely and deliberately embarked on a course, which, if not stopped, would eventually erode the relationship between the father and the child. The Court of Appeals remanded the case to the Chancery Court of

Lawrence County, Tennessee with instructions. The Chancery Court is yet to address those instructions.

The mother filed a Petition to Modify the divorce decree and subsequent order in the Circuit Court of Lauderdale County, Alabama on February 6, 2006. The Father filed a pro se Motion of Lack of Subject Matter Jurisdiction on March 3, 2006 and that motion was granted on March 20, 2006. The Mother filed a Motion to Set Aside Order and Objection to Motion to Dismiss on March 22, 2006 and the court granted that motion on April 7, 2006. The Father answered the Petition for Modification and Counter Petitioned for Contempt on April 21, 2006. The Mother answered the counter claim on April 28, 2006. The Father amended his counter petition on July 31, 2006. The Court entered a Final Order on September 1, 2006. The Father filed a timely Notice of Appeal on October 2, 2006.

The Supreme Court of Alabama issued an opinion reversing the Court of Civil Appeals on September 11, 2009.

ARGUMENT

The trial court erred and the Court of Civil Appeals rightfully reversed the trial court's award of primary physical custody to the Mother because the Mother failed to present sufficient evidence to establish a material change in circumstance affecting the best interest of the child. As an example, the Court addresses the issue that the

child was suffering from anxiety at the custody changes. However, it should be noted that the testimony of the maternal grandmother was in fact that the anxiety of the child had been the same for years. R 220. Therefore, this issue does not amount to a change in circumstance.

Further, as another example, the conclusions the Court reaches with respect to the Father's "intentions" of moving are incorrect. Although it was not part of the record, the Father in fact moved to Florence shortly after the final hearing in this case.

The Court of Civil Appeals correctly relied on Watters v. Watters, 918 So.2d 913 (Ala.Civ.App. 2005). As stated in the prior briefs, this case was directly on point for this situation where the Mother failed to meet her burden of proof. The Court states in its opinion that the issue is whether the change is a material one, so far as to custody of the child is concerned, whether it is natural or not. The Court has incorrectly applied this principle. Even using the best interest standard, the "natural progression" of the child will always create some type of change. To use the Supreme Court's logic, every case will be subject to modification because there will always be "changes" in the set of facts surrounding a child's life. The child will be constantly growing, learning, changing schools, changing friends, etc. This is the natural progression of which the Court of Civil Appeals speaks. A party seeking a change of custody under any standard with that logic being applied would always be able to meet their burden.

In this case, as pointed out throughout the briefs filed by the Father, the Mother has simply failed to meet her burden of proving the required change in circumstance.

The Supreme Court should reconsider its position stated in footnote 6 of its opinion. For the reasons stated in the brief, without restating those at length here, the trial court should not have considered the opinions of Robert Young and Myra Carter on the issue of whether or not equal parenting time was in the child's best interest. Both of those opinions contradict the stated policy of this State contained in Code of Alabama (1975) § 30-3-150.

Approaching this opinion from a different perspective, the Father also respectfully requests rehearing of this appeal on Constitutional grounds because the opinion raises numerous issues of constitutional proportions under the United States Constitution and the Alabama Constitution.

These constitutional issues include, but are not limited to, associational rights of a fit parent and their child under the 1st Amendment of the United States Constitution, and rights of a fit parent and their child to substantive due process, procedural due process, and equal protection under the 14th Amendment of the United States Constitution, and Section 1 and Section 13 of the Alabama Constitution.

As applied to the father in this case by the Supreme Court of Alabama, the "best interest of the child" standard of review ("BIOC") unconstitutionally violates the right of a fit parent to substantive due process because:

> BIOC analysis operates without recognition of the requisite legal presumption that fit parents act in the best interest of their child;
>
> BIOC analysis operates without recognition of the requisite evidentiary standard of proof, clear and convincing evidence. As applied to the father in this case by the Supreme Court of Alabama, the presumption of correctness afforded the trial court's judgment in an ore tenus case violates the right of a fit parent to procedural due process because:
>
> the presumption of correctness vests in the trial judge virtually unbridled discretion to act *in loco parentis*, i.e. sole responsibility for making a highly subjective parenting decisions without any meaningful, objective checks or balances;
>
> the presumption of correctness effectively eliminates the father's right to challenge as constitutionally impermissible the assumptions made by the appellate court in the absence of written findings by the trial judge; and

> the presumption of correctness eliminates the father's right to meaningful appellate review of a trial court judgment that implicates his rights, privileges, and immunities as a fit parent, including, but not limited to, his right to freely associate with his child, protected by the 1st Amendment, and his right to equality as a fit parent, protected by the Equal Protection Clause of the 14th Amendment.

As applied to the child in this case by the Supreme Court of Alabama, the "best interest of the child" standard of review unconstitutionally violates the right of a child to substantive due process because:

> BIOC analysis operates so that the state interferes in the child's relationship with a fit parent without any basis in fact, i.e. BIOC analysis operates as a pretext for unwarranted state intrusion into the child's relationship with a fit parent; and
>
> BIOC analysis operates so that the state deprives the child of the care, companionship, and nurture of a fit parent without rebutting the requisite legal presumption that a fit parent acts in the best interest of their child.

As applied to the child in this case by the Supreme Court of Alabama, the presumption of correctness afforded the trial court's judgment in an ore tenus case violates the right of a child to procedural due

process because:

> the presumption of correctness vests in the trial judge virtually unbridled discretion to act *in loco parentis*, i.e. sole responsibility for making a highly subjective parenting decisions without any meaningful, objective checks or balances;
>
> the presumption of correctness effectively eliminates the child's right to challenge as constitutionally impermissible the failure by the trial judge, the Court of Appeals, and the Supreme Court of Alabama to appoint a personal, legal advocate for the child;
>
> the presumption of correctness eliminates the child's right to meaningful appellate review of a trial court judgment that implicates her rights, privileges, and immunities as a child of fit parents, including, but not limited to, her right to freely associate with her father protected by the 1st Amendment and her right to equal protection of the laws under the Equal Protection Clause of the 14th Amendment.

For these and other reasons (too numerous to address within the page confines of this request for rehearing), the father challenges as unconstitutional under the United States Constitution and the Alabama Constitution:

(1) the "best interest of the child" standard of review as applied to the father in this case; and

(2) the presumption of correctness afforded the trial court's judgment in an ore tenus case, as applied to the father in this case; and

(3) as next friend for his child, the "best interest of the child" standard of review as applied to the child in this case; and

(4) as next friend for his child, the presumption of correctness afforded the trial court's judgment in an ore tenus case, as applied to the child in this case.

The presumption of correctness afforded the trial court's judgment in an ore tenus case, as applied to the father and to the child in this case, is constitutionally impermissible for numerous reasons that can be adequately identified and developed only through full briefing of the issues; consequently, the father, for himself and as next friend for his child, respectfully requests that the Supreme Court of Alabama:

(1) grant rehearing of this case; and

(2) issue a briefing schedule for full briefing of the constitutional issues raised by

the opinion;

(3) conspicuously publish invitations for the filing of amicus briefs in this case from the bench and bar, Alabama law school teachers and students, Constitutional Law scholars, and other stakeholders in the administration of justice in accordance with the Rule of Law in the American System of Justice; and

(4) appoint an expert in Constitutional Law as personal, legal advocate for the child to brief the issues from the perspective of the child; and

(5) remand this case to the Court of Appeals with instructions to remand the case to the trial court for entry of written findings of fact and conclusions of law by the trial judge, followed by trial court briefing of the Constitutional issues.

Among the many issues that should be addressed in the briefs are the following.

Is it a requisite of due process that the trial judge enter written findings of fact and conclusions of law to support every judgment in which the fundamental rights of a fit parent are implicated by a state court custody order? The father, for himself and his child, contends that it is.

Is it a requisite of due process that the trial judge specifically address in their written findings of fact and conclusions of law ("written findings") whether the legal presumption that a fit parent acts in the best interest of their child has been rebutted by the evidence admitted in the case? The father, for himself and his child, contends that it is.

In the case at bar, did the trial judge recognize and consider the legal presumption that a fit parent acts in the best interest of their child before commencing his BIOC analysis? The father, for himself and his child, contends that the trial judge did not. There is no reference in the trial record that the legal presumption (that a fit parent acts in the best interest of their child) was either recognized or considered by the trial judge. The father, for himself and his child, contends the father's fundamental parental rights may not be constitutionally implicated by the state custody order in the absence of written findings on this point that specifically address the legal presumption that a fit parent acts in the best interest of their child.

In applying the presumption of correctness afforded the trial court's judgment in an ore tenus case, are the assumptions made by the Supreme Court of Alabama about the basis of the trial judge's decision legally sufficient to rebut the legal presumption that a fit parent acts in the best interest of their child? The father, for himself and his child, contends they are not. It is going too far for any appellate court to make such assumptions

about inferences when fundamental rights hang in the balance.

In the opinion, the Supreme Court of Alabama identifies four or more possible inferences the circuit court could have made from the evidence. The father, for himself and his child, contends that neither the United States Constitution nor the Alabama Constitution permits the state to take fundamental rights based upon speculation about what the evidence might have shown. Clear and convincing evidence is required by Santosky v. Kramer 455 U.S. 745 (1982). Due process is denied when a trial judge does not enter written findings as to what the evidence was, and that it met the evidentiary threshold required to rebut the presumption that a fit parent acts in the best interest of their child.

The way to avoid constitutionally impermissible appellate assumptions about the basis of the trial judge's decision is for the trial judge to include written findings in every decision that implicates the fundamental rights of a parent.

In the absence of written findings by the trial judge, the way to avoid constitutionally impermissible appellate assumptions about the basis of the trial judge's decision is for the court of appeals to remand the case to the trial judge for entry of written findings by the trial judge before considering the merits of the appeal. Cnf Troxel v. Granville 530 U.S. 57 (2000). Before addressing the merits of

Granville's appeal, the Washington Court of Appeals remanded the case to the Superior Court for entry of written findings of fact and conclusions of law. 137 Wash.2d, at 6, 969 P. 2d, at 23.

In the case at bar, the Supreme Court of Alabama could, and should, altogether avoid the assumptions that stem from the presumption of correctness by remanding this case to the Court of Appeals with instructions to remand the case to the trial court for entry of written findings of fact and conclusions of law.

The premise in the opinion (that "... the task of an appellate court is not to reweigh the evidence, but to determine if there is sufficient evidence to support the trial court's ruling.") (top of page 28) leaves the dispositive evidentiary question unasked and unanswered.

Did the circuit court admit evidence that met the clear and convincing evidentiary threshold needed under Santosky to rebut the presumption that a fit parent acts in the best interest of their child, and if so, where are the written findings of the trial judge as to what that evidence was?

Regardless of the correct application of Watters, the mother had an altogether different burden of proof. The mother had the burden of rebutting a legal presumption in favor of the father that the father was acting in the best interest of their child. The mother had the burden of showing the trial judge evidence that met the legally sufficient

evidentiary threshold of clear and convincing evidence required to rebut that presumption. Santosky, id.

The father, for himself and his child, contends that all of the mother's evidence taken in the light most favorable to her position does not even remotely approach rebutting the presumption in favor of the father that he has always acted in the best interest of their child. The focus on the application of Watters completely misses this crucial point. And it is on this point that the mother's custody modification fails as a matter of law.

In the absence of legally sufficient proof that the father was not acting in the best interest of the child, the state has no factual condition precedent that triggers the exercise of the state's *parens patriae* authority to act in place of the father and mother decide for them what is in the best interest of their child.

When the state has not overcome the presumption a parent is fit, the state should defer as much as possible to the fit parent's liberty to decide the best interest of the child without governmental interference. Under these circumstances, the role of the state should be *de minimis*, and designed to protect and preserve the child's relationship with each fit parent.

This *de minimis* approach prevents the state from dictating for fit parents what is in the best interest

of the minor child, thereby abusing the state's *parens patriae* authority.

Integral to "equal protection of the laws" is the precept that equal citizens at the bar of justice should be treated with equal dignity and respect. So it is when two fit parents stand before the court engaged in litigation over their minor child.

The Supreme Court of the United States has held that state court custody orders are "state actions". As "state action", a child custody order must scrupulously avoid discrimination in favor of either parent unless and until one parent has proven the requisite facts that allow the state to treat the parents differently.

The trial court's BOIC custody order is unconstitutionally overbroad because it permits court ordered parental inequality with the only prerequisite being that the judge thinks visitation serves the best interest of the child. Such unbridled discretion is anathema to the well-established Constitutional jurisprudence that protects fit parents from unwarranted state action. The Supreme Court of the United States reviewed the long line of cases on parental rights in Troxel.

Alabama's BIOC analysis contains no requirement that a court accord a fit parent's decision any presumption of validity or any weight whatsoever. Instead, Alabama's BIOC approach places the best-interest determination solely in the hands of the judge. Should the judge disagree with

either parent's estimation of the child's best interests, the judge's view necessarily prevails. Thus, in practical effect, in the State of Alabama a court can disregard and overturn *any* decision by a fit parent concerning parenting their child, based solely on the judge's determination of the child's best interests. That is exactly what has happened to the father and child in this case.

CONCLUSION

The Father respectfully requests a rehearing on all issues.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing on the following attorney(s) of record, by United States mail, properly addressed and postage prepaid this the 25 day of September 2009:

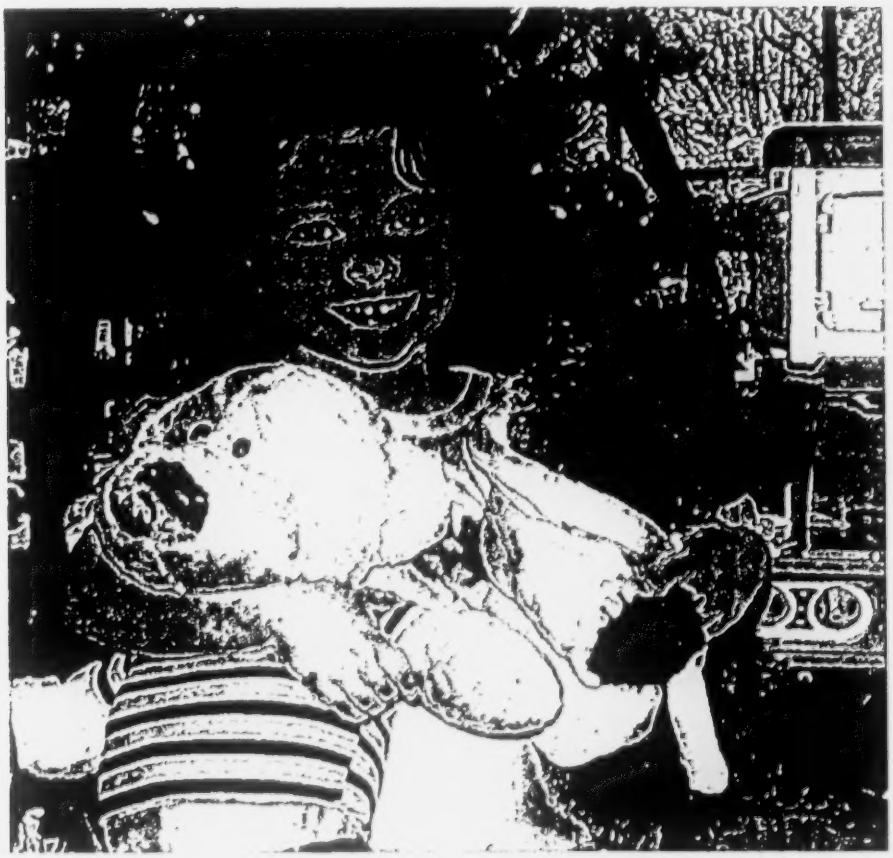
Lindsey Davis
216 West Dr. Hicks Boulevard
Florence, AL 35630

Troy King
Alabama Attorney General
500 Dexter Avenue
Montgomery, AL 36130

/s/ _____ */*
Heath F. Trousdale

APPENDIX L

Alabama Trial Court Exhibit 12



Katie Nichole Davis, Christmas Day Morning At Home with Dad, December 25, 2005.